

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
May 6, 2003 Session

STATE OF TENNESSEE v. GREGORY ROBINSON

Direct Appeal from the Criminal Court for Shelby County
No. 97-13179-80 James C. Beasley, Jr., Judge

No. W2001-01299-CCA-R3-DD - Filed August 13, 2003

The defendant, Gregory Robinson, appeals as of right his conviction for premeditated first degree murder and sentence of death arising from the May 1, 1997, murder of Vernon Green. He also appeals from the judgment of conviction for especially aggravated kidnapping and its twenty-five-year consecutive sentence. A Shelby County jury convicted the defendant of premeditated first degree murder based upon the theory of criminal responsibility for the conduct of another. Following a separate sentencing hearing, the jury sentenced the defendant to death after finding two aggravating circumstances beyond a reasonable doubt, *i.e.*, the murder was especially “heinous, atrocious, or cruel,” *see* Tenn. Code Ann. § 39-13-204(i)(5), and the murder was knowingly committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit a kidnapping, *see id.* § 39-13-204(i)(7). The defendant appeals, presenting for our review the following contentions: (1) the trial court erred in denying the defendant’s motion for individual and sequestered *voir dire*; (2) the trial court’s conclusory rejection of a timely Batson challenge warrants a remand; (3) the evidence was insufficient to sustain the guilty verdicts; (4) the defendant did not receive a fair trial in the guilt phase due to the state’s use of inconsistent theories in the trial of the defendant and the subsequent trial of a co-defendant; (5) prosecutorial misconduct regarding witness Jarvis Shipp deprived the defendant of a fair trial; (6) the state engaged in multiple instances of misconduct affecting identification issues; (7) the display of the victim’s skull and admission of gruesome photographs during the guilt phase were unduly prejudicial; (8) numerous instances of prosecutorial misconduct deprived the defendant of a fair trial; (9) the trial court erroneously instructed the jury as to intentional and knowing conduct, direct and circumstantial evidence, and reasonable doubt; (10) the trial court erred by failing to instruct the jury on the lesser-included offenses of facilitation and solicitation of first degree murder and especially aggravated kidnapping; (11) the trial court erred by failing to declare a mistrial due to instances of jury perjury and likely intrusions into the sequestration of the jury; (12) the trial court erred by not granting a new trial in its role as thirteenth juror; (13) cumulative error warrants reversal of the convictions; (14) the sentence for especially aggravated kidnapping was excessive; (15) the “heinous, atrocious, or cruel” and felony murder aggravators are unconstitutional; (16) the trial court erred in the penalty phase by denying a mistrial when there was testimony regarding the defendant’s prior arrest; (17) the trial court erred by permitting prejudicial and inaccurate information to reach the jurors regarding “aggravating circumstances”; (18) the trial court

unconstitutionally prevented the jury from considering relevant mitigating evidence; (19) the admission of a gruesome photograph during the penalty phase was unduly prejudicial; (20) the prosecutor presented improper jury argument during the penalty phase; (21) the trial court gave erroneous jury instructions during the penalty phase concerning reasonable doubt and the “knowing” *mens rea* for the felony murder aggravator; (22) the aggravating circumstances were not established; (23) the state’s use of inconsistent theories in the trials of the defendant and a co-defendant deprived the defendant of a fair sentencing determination involving the death penalty; (24) the death sentence should be vacated based upon a violation of Apprendi v. New Jersey; (25) the trial court erred by not granting a new sentencing hearing based upon its role as thirteenth juror; (26) the trial court erred in failing to find the death penalty, lethal injection, and the system of capital punishment in Tennessee are unconstitutional; and (27) a comparative proportionality review should result in vacating his death sentence. Upon our review, we reverse both convictions and remand for a new trial due to the failure to instruct on facilitation and solicitation as lesser-included offenses.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court
Reversed; Remanded for New Trial**

JOE G. RILEY, J., delivered the opinion of the court, in which DAVID G. HAYES and JOHN EVERETT WILLIAMS, JJ., joined.

Joseph S. Ozment and Steffen G. Schreiner, Memphis, Tennessee (at trial); and Edmund L. Carey, Jr., Nashville, Tennessee, and Robert C. Brooks, Memphis, Tennessee (on appeal), for the appellant, Gregory Robinson.

Paul G. Summers, Attorney General and Reporter; Alice B. Lustre, Assistant Attorney General; William L. Gibbons, District Attorney General; and Patience R. Branham and Paula Wulff, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

The Shelby County Grand Jury returned indictments charging the defendant and his co-defendants, Charlie Golden, Antonio Jackson, Kevin Wilkins, Jarvis Shipp, Prentiss Phillips, and Charles A. Pool, with conspiracy to commit first degree murder, conspiracy to commit especially aggravated kidnapping, premeditated first degree murder, and especially aggravated kidnapping, all relating to the kidnapping and murder of Vernon Green on May 1, 1997. The defendant was convicted by a jury of premeditated first degree murder and especially aggravated kidnapping. He was subsequently sentenced to death for premeditated first degree murder and a consecutive term of twenty-five years for especially aggravated kidnapping. This appeal ensued.

STATE’S PROOF - GUILT PHASE

Raymond Pearson testified he belonged to a walking club which met at Bellevue Park in Memphis, Tennessee. Pearson recalled that, on the morning of May 1, 1997, he arrived at the park at approximately 5:10 a.m. and discovered a body. The deceased was subsequently identified as Vernon Green.

Officer Alvin Peppers of the Memphis Police Department reported to the scene at Bellevue Park. He was unable to identify any of the victim's features because the "face of the body was so mutilated that there was nothing that we could identify." Live handgun bullets, spent handgun bullet casings, and a spent shotgun shell casing were found near the victim.

Christopher James, known as "Big Chris," testified that he formerly belonged to the Gangster Disciples. He explained that after the events of April 30-May 1, 1997, he ceased being a member. On April 30, 1997, James was with Jarvis Shipp (J-Roc), "Popcorn," and "Steve." Shipp's girlfriend got into a fight with another female, Snoop's girlfriend, at around 5:00 or 6:00 p.m. "Snoop" was a member of a rival gang, the Vice Lords. James recalled that later, while he, Shipp, and Popcorn were walking, "Snoop came up to Shipp and swung at him and they got into a fight." Snoop's friend, "Rico," then came outside with a gun; James and Popcorn fled up a hill.

According to James, he and Popcorn then went to the apartment of sisters Natalie, Nichole, and April Black in Hurt Village in Memphis. At the apartment, James, Popcorn, and a man named "Dirty" were later joined by Shipp and Prentiss Phillips, who were also Gangster Disciples. Twenty to thirty additional members of the Gangster Disciples later arrived at the apartment.

Vernon Green was seen outside of the apartment. One of the Gangster Disciples, whom James identified as the defendant, instructed Shipp and three other Gangster Disciples to "go snag [Vernon Green] up." James testified Green was not involved in any of the fights that had occurred earlier that day, nor was Green a member of any gang. James testified there was no discussion or hesitation regarding the defendant's instructions.

At approximately 10:00 p.m., Green was brought back to the apartment, accompanied by "[t]wo disciples in front, two disciples in the back." They placed Green in the middle of the floor; the defendant asked Green why he was watching out for the Vice Lords; and the defendant hit Green numerous times both with his fist and a broom stick. James testified he (James) was then "jumped on by six Gangster Disciples" and beaten, and the defendant put a pistol in James's face and threatened him.¹ James explained that he was being sanctioned by the Gangster Disciples for failing to help Shipp during the fight with Snoop.

After James was beaten, he observed Green being taken from the apartment with a black shirt over his face. Shipp, Prentiss Phillips, and the defendant were talking to one another in the kitchen when James overheard the defendant say, "Y'all know what to do." After Green was escorted out of the apartment, Shipp, Fufu, Antonio Jackson, and Big Folk left. After they left, Prentiss Phillips and Steve walked James to his house.

On cross-examination, James was questioned regarding a statement he made to the police on May 8, 1997. In that statement, James informed police that "[he] saw Anthony, Jarvis Shipp, *Shaun*, and a big heavy-set guy that I don't know his name, Antonio Jackson, and Big Folk" kill

¹The defendant contends James subsequently recanted that the defendant put a gun in his face. However, James testified that Phillips put a gun in his face after Green was taken from the apartment. James's original testimony of the defendant's putting a gun in his face appeared to relate to the time James was beaten, which was before Green was taken from the apartment. We are unable to conclude that James recanted his original testimony.

Green. (Emphasis added). Additionally, James said Prentiss Phillips was the person who stated Green was watching out for the Vice Lords. Shaun had instructed the other gangsters to get Green, and Shaun beat Green. James admitted he never mentioned the defendant's name in his May 8 statement to the police. The statement provided to the police also contained the following information:

J-Roc, MacKaos, Shaun, and Low-Down went into the kitchen for a private meeting. And I heard them talking softly to each other for about five minutes. And then J-Roc and Shaun came out of the kitchen. And then MacKaos and Low-Down came out of the kitchen. And MacKaos said, you all need to take care of this and told Jarvis, what you-all do now is personal. Then MacKaos and Low-Down left.

James admitted the statement was true and further admitted his statement was inconsistent with his testimony in court. Notwithstanding, on re-direct examination, James stated he referred to the defendant as "Shaun" because that is what Vernon Green had called him. James testified that it was not until the first day of trial that he knew the defendant by his real name, Gregory Robinson.

Jarvis Shipp, also known as "J-Roc," stated he was a former member of the Gangster Disciples. He corroborated James's testimony concerning the confrontation with Snoop, a Vice Lord. He stated that when they fled to the hill, he saw Christopher James, Popcorn, Prentiss Phillips, Isiah Triplett, Sepacus Triplett, Steve Hardin, and James Lee White Carradine, all members of the Gangster Disciples. Prentiss Phillips, the coordinator of the Hurt Village Gangster Disciples, decided that it was time to "take it to another level," and retaliate. Kaos, the governor, was called as was the defendant, who was the chief of security in Memphis. After the telephone calls were made, the gang members began arriving at the Black sisters' apartment. Shipp testified between forty and eighty Gangster Disciples were present, and he observed numerous handguns.

Shipp stated the defendant was from the Mitchell Heights area and, at the time, held the position of chief of security for the city of Memphis. The chief of security ensured that all the securities of the different sections were organized, and, if the leader of the gang was not present, the chief of security gave the orders. Shipp later clarified that the defendant was actually third in command, but, at the time, the leader, "T-Money," was not in town, and Kaos, the "governor" and second in command, was also unavailable.

Shipp testified that when the defendant arrived at the apartment, he asked Shipp the identity of the person peering around the corner. Shipp advised him that the person was Vernon Green, and Prentiss Phillips and others said Green was a Vice Lord. The defendant then ordered that Green be placed on "GD arrest." Shipp and others found Green and escorted him back to the apartment, where the defendant, Prentiss Phillips, and Kevin Wilkins physically abused Green. Green, although denying he was a Vice Lord, advised Shipp that Snoop and others were at a particular location; the defendant ordered Shipp and five others to go to this location. Shipp and the others failed to see anyone and returned to the apartment.

Shipp testified that when the defendant learned Green's initial report of the location of the Vice Lords was false, he ordered that Green be taken upstairs. Shipp went upstairs and observed Green on the floor with numerous gang members pointing guns at Green's head and threatening to kill him. Shipp returned downstairs and observed members being instructed to form a circle around

James, who was being put “in violation.” The defendant and Prentiss Phillips announced James had “six minutes six seconds, no cover up,” meaning James would be beaten for six minutes and six seconds by six people. After the beating, James was escorted out of the building. After James left, Green was escorted downstairs. Green had a t-shirt over his head so that he could not see where he was going. The t-shirt also restricted his hands in such a way that he could not defend himself.

Shipp testified that the defendant, Prentiss Phillips, and Kevin Wilkins spoke to Kaos on a cell phone. According to Shipp, each of the three persons individually spoke to Kaos during this “one long continuous conversation.” After hanging up, “[t]hey said Kaos said, ‘take him fishing.’” Shipp, who was not a part of the conversation with Kaos, understood this to mean they were to “take him way out somewhere out of the district, rough him up a little bit by physical abuse, and let him get back the best way he could.” The defendant then directed Phillips and Wilkins to select six men to take Green to a destination. Phillips and Wilkins complied with this directive; Wilkins left with those chosen; and Phillips remained at the apartment.

Shipp testified the men took Green to Bellevue Park and escorted him up a hill. Green pled with them to let him go. Shipp testified that although Wilkins was not superior in rank to the defendant, Wilkins was the “big head” who was giving directives at the park. Wilkins suggested that the other men “stand a few steps away” from Green, who was then on the ground. Then Wilkins kicked Green in the side and asked him if he had any last words. Shipp then heard a gun being cocked. The gun was fired, and Green was shot in his lower back; Green was lying face down. A second shot was fired by Antonio Jackson, who remarked to Wilkins that the buckshots were not affecting Green. Wilkins then ordered Paris to give him a chrome plated automatic pistol. Wilkins passed the pistol to Jackson, who shot Green in the head. The gun jammed, Jackson adjusted it, and he fired again. The gang members then fled the scene.

Shipp testified that two days after the murder, the defendant took Shipp along with his “baby’s mother” and his children to a local motel and told Shipp not to answer his pager or use the telephone. Three days later, the defendant sent three men to pick up Shipp and his family at the motel.

Sergeant William Ashton of the Memphis Police Department testified he showed a photograph array to Christopher James. He recalled that James identified the photograph of Gregory Robinson, whom James referred to as “Shaun.”

Dr. Thomas Deering, a forensic pathologist and assistant medical examiner in Shelby County, performed the autopsy on the body of Vernon Green. Dr. Deering determined that the cause of death was multiple gunshot and shotgun wounds to the head, back, and left buttock. Dr. Deering opined that the wounds were painful and that the victim was alive when the various wounds were inflicted.

DEFENSE PROOF - GUILT PHASE

In his defense, the defendant presented the testimony of James Lee White Carradine, who testified that, not only did he not know whether the defendant was a Gangster Disciple, but also that he did not know the defendant. Carradine explained that, although there was a person named “Greg”

or “MacGreg” present at the apartment in Hurt Village on the evening of Vernon Green’s murder, that person was not the defendant. Carradine further testified that the person known to him as “MacGreg” had “top rank,” but Prentiss Phillips was “over that MacGreg.” He then stated that “Kaos was the dude that was over all of it.” Carradine maintained that the defendant was not at the apartment on the evening of the murder.

Carradine testified regarding a “red Greg” who was a high-ranking member of the Gangster Disciples. He stated, however, that Gregory Robinson was not the “red Greg” to whom he referred. The “Greg” described by Carradine was armed with a gun that evening. Carradine further noted that the “MacGreg” he described had “a bunch of tattoos and got twelve gold in his mouth”; a “six-point star in the web of his hand”; tattoos on his neck, body, and arms, including a “GD” tattoo; a “MacGreg” tattoo on his right forearm; and a “to the world blow” tattoo on his left arm.

The defendant displayed his person to the jury. The record reflects he had no tattoos on his chest or neck and no “MacGreg” tattoo. Although he had other tattoos, they did not meet Carradine’s descriptions. He also had ten gold teeth with “Greg” spelled out on his top teeth.

Annie Robinson, who is the defendant’s mother, along with Nichole Robinson and Patricia Anne Robinson, two of the defendant’s sisters, testified the defendant never had tattoos nor gold teeth as described by Carradine. The defendant’s mother, along with the defendant’s friends, Danny Williams and Ronald Dowell, testified the defendant was never in a gang.

Sepacus Triplett testified he has never been a member of the Gangster Disciples although he was present at the apartment on April 30, 1997. He testified the defendant was not present at the apartment on this evening.

Frederico Mason testified that, although he was not a member of the Gangster Disciples, he was present at the apartment on the evening of April 30, 1997. He stated he was familiar with a man named “MacGreg”; the defendant was not MacGreg; and the defendant was not at the apartment. Mason further testified he heard Prentiss Phillips and Shipp discussing the fate of Vernon Green. On cross-examination, Mason admitted he left the apartment at approximately 10:00 p.m. and did not return until approximately 3:00 a.m. the next morning.

Steven Hardin testified he entered a guilty plea to facilitation to commit especially aggravated kidnapping in this case. He stated that on the evening of April 30, 1997, he arrived at the Blacks’ apartment between 5:30 and 6:00 p.m.. Shipp called an “aid and assist” meeting to which many responded, including a person named “MacGreg.” Hardin stated the defendant was not “MacGreg,” and at no time during the evening did he observe the defendant at the apartment.

April Black testified that, on the evening of April 30, 1997, she was being held in a room at gunpoint by members of the Gangster Disciples. Black affirmed her acquaintance with members of the Gangster Disciples, including Kaos, MacGreg, and Prentiss Phillips. She stated that the man she knows as MacGreg is not the defendant.

Horace Black, April Black's brother, testified he knew the defendant from jail. He stated that, to his knowledge, the defendant had never been a Gangster Disciple. Horace Black testified he (Black) had been a Gangster Disciple for ten years.

Richard Parker, a Memphis police officer assigned to the Gang Task Force, testified for the defense about gang tattoos, noting Gangster Disciples often have readily identifiable tattoos. He stated the defendant's tattoos could "possibly" be gang tattoos, but he could not readily identify them as such. However, he stated the defendant had a tattoo of the word "RED" with the letter "E" resembling a Gangster Disciple trademark, "although it was missing the post under it." He further noted gang members often "camouflage" their tattoos; tattoos can be easily changed; some gang members do not have tattoos; and the gold teeth, which are common among Gangster Disciples, are easily removable and changeable.

JURY'S VERDICT - GUILT PHASE

After being instructed as to the applicable law by the trial court, the jury retired to deliberate its verdict. Less than three hours later, the jury returned with a verdict finding the defendant guilty, based upon criminal responsibility for the conduct of another, of premeditated first degree murder and especially aggravated kidnapping.

STATE'S PROOF - PENALTY PHASE

Sergeant Alvin Peppers testified again on behalf of the state at the penalty phase of the trial. Sergeant Peppers identified a photograph of the victim's body as found at Bellevue Park on the morning of May 1, 1997. As proof of the "heinous, atrocious, or cruel" aggravating circumstance, the state relied upon this photograph. The state relied upon proof introduced during the guilt phase to support the felony murder aggravator.

DEFENSE PROOF - PENALTY PHASE

The defendant presented the testimony of Patricia Anne Robinson, one of the defendant's five sisters. She testified her brother had seven children ranging in age from one to six years old in addition to some step-children. She further stated they are a large close-knit family.

Stacy Robinson, another of the defendant's sisters, testified the defendant was involved in the lives of her children and helped her financially with her children. She recalled that, while in school, the defendant had primarily A's and B's and generally did well in school. Stacy begged the jury to spare the life of her only brother.

Ronald Dowell testified he had known the defendant for eight years and observed him with his friends and family. He described the defendant as "a very loving father." He further testified he and the defendant often attended church together. Dowell explained that, although the defendant did not have a steady job, he did work for Dowell's uncle repairing construction equipment. He added the defendant had previously worked at Exxon and at a steel factory.

Debra McNeese, a mitigation specialist with Probation Management Group, was appointed to conduct mitigation work for the defendant. Her investigation confirmed that the Robinson family was “definitely a tight knit family.” She discovered that the defendant repeated the fourth and seventh grades. School officials discovered the defendant had a learning disability when he was in the seventh grade, but there were no indications that he was placed in a resource class. The defendant dropped out of school in the ninth grade.

The defendant’s mother, Annie Robinson, testified the defendant is the youngest of her six children and her only son. She stated the defendant was diagnosed with a learning disability when he was fifteen years old. The defendant left school after the ninth grade and worked with his father at Eagle Iron Work where he learned how to weld. She stated the defendant has seven children and is a wonderful father.

Gregory Robinson asked the jury to spare his life so that he would be able to see his children.

JURY’S VERDICT - PENALTY PHASE

The jury was instructed on the following statutory aggravating circumstances:

(5) The murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death; and

(7) The murder was knowingly committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit kidnapping.

See Tenn. Code Ann. § 39-13-204(i)(5), (7) (1997). The jury was also instructed that it should consider ten specific mitigating factors, plus any other mitigating factors raised by the evidence.

After deliberations, the jury found the state had proven both aggravating circumstances. The jury further found that the aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt. In accordance with their verdicts, the jury sentenced the defendant to death for the murder of Vernon Green.

ANALYSIS OF ISSUES PRESENTED - GUILT PHASE

I. DENIAL OF INDIVIDUAL AND SEQUESTERED *VOIR DIRE* OF THE VENIRE

The defendant claims that the trial court erred in denying his motion for individual, sequestered *voir dire* of the jury panel. The prevailing *voir dire* practice is to examine jurors collectively. State v. Austin, 87 S.W.3d 447 app. at 471 (Tenn. 2002), *cert. denied*, ___ U.S. ___ (2003). There is no requirement in capital cases that death qualification of a capital jury be conducted by individual, sequestered *voir dire*. *Id.* (citing State v. Stephenson, 878 S.W.2d 530, 540 (Tenn. 1994)). Moreover, as a general rule, the decision to allow individual *voir dire* of prospective jurors is within

the discretion of the trial court. Stephenson, 878 S.W.2d at 540. The defendant has failed to show the trial court abused its discretion in denying his motion for individual, sequestered *voir dire*.

II. REJECTION OF BATSON CHALLENGE

The defendant contends that the trial court's conclusory rejection of a timely Batson challenge to the state's striking of five African-American members of the venire, without any contemporaneous findings and without requiring the state to proffer an explanation, warrants a remand for a hearing to determine whether a new trial should be granted.

During *voir dire*, seven jurors were excused by the state as a result of peremptory challenges. After their dismissal, the defense raised an objection and noted that five of these jurors were African-American. The trial court found there was no basis to declare that any of the challenges were based upon race.

A state's use of peremptory challenges to intentionally exclude jurors of the defendant's race violates the defendant's right to equal protection. Batson v. Kentucky, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The Court upheld this principle in Powers v. Ohio, but eliminated the requirement that the defendant and the potential juror share the same race. 499 U.S. 400, 415, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). A defendant seeking to raise a Batson claim must first make a *prima facie* showing of purposeful discrimination against a prospective juror. Batson, 476 U.S. at 93-94. The defendant must establish "that a consideration of all the relevant circumstances raises an inference of purposeful discrimination." Woodson v. Porter Brown Limestone Co., 916 S.W.2d 896, 903 (Tenn. 1996). If a *prima facie* showing of purposeful discrimination is established, the burden then shifts to the state to establish a neutral basis for the challenge. Batson, 476 U.S. at 97.

The trial court must give specific reasons for each of its factual findings in ruling on peremptory challenges. Woodson, 916 S.W.2d at 906. This should include the reason the objecting party has or has not established a *prima facie* showing of purposeful discrimination. The trial court's findings are to be accorded great weight and will not be set aside unless they are clearly erroneous. *Id.*; *see also* Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (noting deference to the trial court is necessary relating to credibility).

The trial court found that the defendant had not made a *prima facie* showing of discrimination. In determining whether the defendant has established a *prima facie* case, the trial court may consider whether similarly situated members of another race were seated on the jury. State v. Stout, 46 S.W.3d 689, 711 (Tenn.) (citations omitted), *cert. denied*, 534 U.S. 998 (2001). The trial court may also consider the demeanor of the attorney who exercised the challenge, which is often the best evidence of the credibility of proffered explanations. *Id.* at 711-12 (citations omitted).

In the instant case, the record reveals that the final jury consisted of six African-Americans and six Caucasians. At the motion for new trial, the court commented that the only reason advanced by the defense to establish a *prima facie* case was the number of strikes used against African-Americans. While the court conceded that a *prima facie* case may be established by numbers alone, the trial court further explained that was not done in the instant case. Indeed, the trial court stated:

. . . if all you're standing up and saying is . . . numbers alone, that's my *prima facie* case, I still – and I know what the case law says – but I'm still of the opinion that at the time of my observations, my being present, listening to the jurors testify, observing the demeanor of the jurors, watching and taking notes of what was going on, I was not convinced at that time that there was a systematic exclusion of African-Americans from this jury, and that was the basis for it; not strictly on numbers, but it was based on the overall circumstances of what was occurring in the courtroom.

We cannot conclude that the trial court's findings were clearly erroneous. See State v. Keen, 31 S.W.3d 196 app. at 227-29 (Tenn. 2000) (holding there was no showing of purposeful discrimination where four African-American jurors were peremptorily challenged by the state), *cert. denied*, 532 U.S. 907 (2001). In light of the trial court's findings, we conclude this issue is without merit.

III. SUFFICIENCY OF THE EVIDENCE

The defendant contends the evidence was insufficient to support his convictions. We conclude the evidence was sufficient to support both convictions.

A. Legal Standard

In Tennessee, great weight is given to the result reached by the jury in a criminal trial. A jury verdict accredits the state's witnesses and resolves all conflicts in favor of the state. State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994). On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *Id.*; State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Moreover, a guilty verdict removes the presumption of innocence which the appellant enjoyed at trial and raises a presumption of guilt on appeal. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). The appellant has the burden of overcoming this presumption of guilt. *Id.*

Where sufficiency of the evidence is challenged, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime or crimes beyond a reasonable doubt. Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Abrams, 935 S.W.2d 399, 401 (Tenn. 1996). The weight and credibility of the witnesses' testimony are matters entrusted exclusively to the jury as the triers of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Brewer, 932 S.W.2d 1, 19 (Tenn. Crim. App. 1996).

The state's theory at trial was that the defendant was responsible for the actions of his fellow Gangster Disciples based upon the theory of criminal responsibility. It is undisputed that the defendant was not present at the murder scene. As applicable to the case at bar, a person is criminally responsible for the conduct of another if, "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense." Tenn. Code Ann. § 39-11-402(2) (1997).

B. Analysis of Overall Sufficiency of the Evidence

In this case, it is without dispute that the victim was unlawfully removed or confined so as to substantially interfere with his liberty; it was accomplished with a deadly weapon; and the victim suffered serious bodily injury. Thus, an especially aggravated kidnapping was committed. *See id.* §§ 39-13-302(a), -305(a)(1), (4). It is further without dispute that the victim was intentionally killed with premeditation. Thus, a premeditated first degree murder was committed. *See id.* § 39-13-202(a)(1). The only issue relating to sufficiency of the evidence is whether the defendant was criminally responsible for the conduct of those who actually committed or consummated these offenses. *See id.* § 39-11-402(2).

We begin our detailed analysis of the evidence in this case by reiterating that our standard of examining the evidence in a light most favorable to the state includes “all reasonable and legitimate inferences that may be drawn therefrom.” *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000) (citing *Cabbage*, 571 S.W.2d at 835). Thus, we recognize that jurors may evaluate the evidence in light of their common experiences in life and their common sense. *See Liakas v. State*, 286 S.W.2d 856, 858-59 (Tenn. 1956).

Viewing the evidence in a light most favorable to the state, the evidence established the defendant was a high ranking Gangster Disciple. He was portrayed as chief of security for the entire city of Memphis. Upon his arrival at Black’s apartment, he ordered fellow Gangster Disciples to “snag” the victim for “GD arrest.” Several Gangster Disciples, in parade-like fashion, brought the victim before the defendant. The defendant initiated a beating of the victim by hitting him numerous times; others subsequently joined in the beating. The defendant demanded that the victim tell him the location of the Vice Lords. Reluctantly, the victim revealed a location. The defendant then ordered some Gangster Disciples to scout the location and return with their findings, which they did. The evidence further indicated that the defendant was angry upon learning that the Vice Lords were not at the location described by the victim. The defendant, Prentiss Phillips, and Kevin Wilkins were each part of a telephone conversation with Kaos, who was superior in rank to the defendant. Immediately after this conversation, the defendant directed Phillips and Wilkins to each pick three men and take the victim “fishing.” He further stated, “Y’all know what to do.” Thus, it was reasonable for the jury to assume the defendant, Phillips, and Wilkins were all aware of Kaos’s directive, and the defendant ordered that Phillips and Wilkins be responsible for carrying out that directive. Although Shipp thought the order to take the victim “fishing” only meant physical abuse, Shipp was not a part of the conversation with Kaos.

The jury could further infer that Wilkins, who had been a part of the phone conversation and knew the victim was to be killed, was ordered by the defendant to carry out the directive. One of the first things said to the victim at the park was from Wilkins, who was the ranking Gangster Disciple at the park and who asked the victim if he had any last words. The murder was then accomplished under Wilkins’ direction.

As it relates to the charge of premeditated first degree murder, the state was required to establish beyond a reasonable doubt that the defendant in giving these orders had the specific intent that the victim be murdered. *See* Tenn. Code Ann. § 39-11-402(2). Viewing the evidence in a light most favorable to the state, we conclude a rational trier of fact could find the defendant and Wilkins

got the directive from Kaos that the victim was to be killed; the defendant ordered Wilkins (and Phillips) to carry out the directive; and Wilkins, a subordinate of the defendant, personally supervised the murder. The jury could further rationally conclude from the evidence that the Gangster Disciples was an organization structured according to rank and that orders given by those of superior rank should be obeyed in order to avoid severe sanctions. Thus, the jury could rationally conclude Wilkins carried out the order of the defendant.

What started out as a rift between a Vice Lord and a Gangster Disciple culminated in the gathering of a throng of Gangster Disciples, heavily armed and bent on retaliation. The retaliation effort had as one of its leaders the defendant. The lower-ranking Gangster Disciples followed not only the defendant's orders, but his example of violence.

Accordingly, the evidence is sufficient to support the conviction for criminal responsibility for premeditated first degree murder.

As to the defendant's conviction for especially aggravated kidnapping, we conclude the evidence is sufficient. Viewing the evidence in a light most favorable to the state, the defendant ordered the victim to be brought to the apartment where numerous Gangster Disciples had weapons. The defendant severely beat the victim with his fist and a broom stick; others beat him as well. The defendant ordered that Green be taken upstairs where numerous gang members threatened him with weapons pointed at his head. The defendant ordered Green be taken "fishing" and told his fellow Gangster Disciples, "Y'all know what to do." Wilkins followed those orders, took the victim to Bellevue Park, and supervised the murder. This evidence is more than sufficient to support the defendant's conviction for especially aggravated kidnapping.

C. Accomplice Corroboration

The defendant argues that the evidence is insufficient because it consisted of uncorroborated accomplice testimony. Additionally, he asserts that the trial court failed to instruct the jury that (a) accomplice testimony cannot be corroborated by evidence from another accomplice; (b) only a non-accomplice can corroborate the testimony of an accomplice; (c) Jarvis Shipp was an accomplice as a matter of law; and (d) the jury must decide whether Christopher James and Shaun Washington were accomplices.

1. Waiver

The state contends that the defendant has waived these issues for failing to submit proposed instructions on accomplice testimony. *See State v. Anderson*, 985 S.W.2d 9, 17 (Tenn. Crim. App. 1997) (holding the failure to request accomplice instruction waives issue); *State v. Foster*, 755 S.W.2d 846, 848-49 (Tenn. Crim. App. 1988) (noting the defendant's responsibility to request instruction; failure constitutes waiver).

In instructing the jury regarding accomplice testimony, the trial court utilized the pattern jury instruction. *See T.P.I.—CRIM. 42.09* (4th ed. 1995). The trial court further instructed the jury that they were to determine whether the witness, Jarvis Shipp, was an accomplice to the alleged crime.

The pattern charge does not contain a specific provision that accomplice testimony cannot be corroborated by other accomplice testimony.

The record reflects the trial court advised the parties that it would be instructing on accomplice testimony. There were no special requests. After instructing the jury and prior to jury deliberations, there were no objections and no special requests. Tennessee Rule of Criminal Procedure 30(b) provides that the parties are to be given an opportunity to object to the content of jury instructions or the failure to give requested instructions; however, the failure to make objections in these instances does not prohibit them from being used as grounds in the motion for new trial. *See* Tenn. R. Crim. P. 30(b); State v. Lynn, 924 S.W.2d 892, 898-99 (Tenn. 1996). However, alleged omissions in the jury charge must be called to the trial judge's attention or be regarded as waived. State v. Haynes, 720 S.W.2d 76, 84-85 (Tenn. Crim. App. 1986). In contrast to an erroneous instruction or the failure to give a requested instruction, defense counsel cannot sit on an objection to an omitted charge and allege it as a ground in the motion for new trial. *Id.*; State v. Tracey E. Stigall, No. 02C01-9610-CR-00371, 1998 Tenn. Crim. App. LEXIS 27, at *4 (Tenn. Crim. App. Jan. 7, 1998, at Jackson).

The jury instruction given by the trial court was accurate. The defendant has waived any alleged error for the failure to specifically charge the jury that accomplice testimony cannot be corroborated by the testimony of other accomplices. Further, we discern no plain error. *See* Tenn. R. Crim. P. 52(b).

2. Standard of Review

An accomplice is a person who “knowingly, voluntarily and with a common intent unites with the principal offender in the commission of a crime.” State v. Allen, 976 S.W.2d 661, 666 (Tenn. Crim. App. 1997). Uncorroborated testimony of an accomplice-witness will not support a conviction. State v. Bane, 57 S.W.3d 411, 419 (Tenn. 2001), *cert. denied*, 534 U.S. 1115 (2002). Corroborating evidence is evidence “entirely independent of the accomplice’s testimony, which, taken by itself, leads to the inference not only that a crime has been committed but also that the defendant was implicated in it.” Bigbee, 885 S.W.2d at 803 (citations omitted). The independent corroborative testimony must include some fact or circumstance which affects the defendant’s identity. State v. Boxley, 76 S.W.3d 381, 387 (Tenn. Crim. App. 2001). In Bethany v. State, this court stated:

The question of who determines whether a person is an accomplice depends upon the facts of each case. When the facts of a witness’s participation in a crime are clear and undisputed, it is a question of law for the court to decide. When such facts are in dispute or susceptible of an inference that a witness may or may not be an accomplice, it then becomes a question of fact for the jury to decide.

565 S.W.2d 900, 903 (Tenn. Crim. App. 1978); *see* State v. Lawson, 794 S.W.2d 363, 369 (Tenn. Crim. App. 1990).

3. Christopher James

The evidence established that Christopher James was a relatively new member of the Gangster Disciples and had no “rank” within the group. The evidence further established that, at the “aid and assist” meeting held at the apartment, James was punished for failing to take part in the earlier fight that initiated the chain of events culminating in the murder. Although he was present when Vernon Green was brought into the apartment, there is no evidence that James did anything other than sustain a beating for his failure to assist fellow gang members earlier that day. The proof fails to establish that James was an accomplice to the murder and kidnapping of Vernon Green.² Thus, the defendant’s argument that the trial court should have submitted an instruction to the jury as to whether Christopher James was an accomplice is without merit.

4. Shaun Washington

The defendant contends Shaun Washington’s identification should be considered accomplice testimony. Washington did not testify as a witness in this matter. Sergeant William Ashton testified that Christopher James identified the defendant in a photo line-up as the person whom James referred to as “Shaun.” Defense counsel asked Sergeant Ashton on cross-examination if anyone else identified the defendant in the photo line-up. Sergeant Ashton, in response to this question, stated that Washington had identified the defendant as being present at the apartment on the night of the murder. There was no request that Washington be included in the accomplice instruction. This issue is waived.

5. Jarvis Shipp

Jarvis Shipp was an accomplice to the kidnapping and murder as a matter of law. A common test for determining accomplice status is whether the witness could have been indicted for the offense. State v. Perkinson, 867 S.W.2d 1, 7 (Tenn. Crim. App. 1992). Here, Shipp was jointly indicted with the defendant for the offenses. We further believe his testimony established that he was an accomplice. The trial court instructed the jury that they were to determine whether Jarvis Shipp was an accomplice as a question of fact. We conclude this instruction was error. *See Anderson*, 985 S.W.2d at 16 (holding it is for the trial court, not the jury, to determine accomplice status where it is clear and undisputed that the witness participated in the crime).

Ordinarily, this error would be harmless. *See Perkinson*, 867 S.W.2d at 8. The testimony of Christopher James corroborated the testimony of Shipp as to the defendant’s identity. Regardless, other errors require reversal of the convictions.

²We note that in the case of co-defendant Antonio Jackson, a panel of this court concluded that evidence of James’s presence at the apartment did not implicate him as an accomplice to the kidnapping or murder of Green. State v. Jackson, 52 S.W.3d 661, 666 (Tenn. Crim. App. 2001).

D. Identification Evidence

Within his challenge to the sufficiency of the evidence, the defendant challenges the following identifications: (1) the identification made by Christopher James using a photograph array; (2) the identification made by Shaun Washington; (3) the testimony of Jarvis Shipp; and (4) the testimony of Nichole Black. With the exception of the challenge to Shipp's testimony, these issues are discussed in issue six, *infra*. Regarding Shipp, the defendant contends that his testimony is uncorroborated. However, we have concluded that the evidence sufficiently corroborated Shipp's testimony. Moreover, any conflicts between Shipp's testimony and his prior statement to police were thoroughly addressed on cross-examination.

E. Testimony of Christopher James

The defendant alleges the testimony of Christopher James as to what he thought was going to happen to the victim when he left the apartment was "pure, baseless speculation" and should be excluded from consideration in this appeal. During direct examination of James, the following colloquy occurred:

Q: What did you hear him say?

A: "Y'all know what to do."

...

Q: Now, was this after they had beaten you up?

A: Yes, ma'am.

Q: What did you think – what did you feel at this time was going on?

A: I really couldn't say.

Q: What did you think was going to happen to Vernon?

A: They was going to kill him.

No objection was made by the defendant. By failing to make a contemporaneous objection to testimony, a defendant waives appellate consideration of the issue. State v. Alder, 71 S.W.3d 299, 302 (Tenn. Crim. App. 2001); State v. Thompson, 36 S.W.3d 102, 108 (Tenn. Crim. App. 2000). Accordingly, absent an objection, the statement was properly admitted as proof. State v. Stevens, 78 S.W.3d 817 app. at 849 (Tenn. 2002), *cert. denied*, ___ U.S. ___ (2003). We further discern no plain error. *See* Tenn. R. Crim. P. 52(b).

F. Improperly Admitted Evidence

The defendant contends some evidence was improperly admitted during trial and submits that such evidence should not be considered in determining sufficiency of the evidence. However, we must consider all evidence submitted at trial, and we may not limit our analysis to only the evidence that is determined upon review to be admissible. State v. Longstreet, 619 S.W.2d 97, 100-01 (Tenn. 1981); State v. Alley, 968 S.W.2d 314, 316 (Tenn. Crim. App. 1997).

G. Anthony Issue

The defendant contends his convictions for both premeditated first degree murder and especially aggravated kidnapping violate due process because the kidnapping was incidental to the murder. We disagree.

A separate conviction for kidnapping may violate due process when the kidnapping is “essentially incidental” to the accompanying felony conviction and is not “significant enough, in and of itself, to warrant independent prosecution.” State v. Anthony, 817 S.W.2d 299, 306 (Tenn. 1991). In examining this issue, we must first determine whether the movement or confinement employed was beyond that which was necessary to commit the accompanying felony. State v. Dixon, 957 S.W.2d 532, 535 (Tenn. 1997). If so, we must next determine whether the additional movement or confinement: “(1) prevented the victim from summoning help; (2) lessened the defendant’s risk of detection; or (3) created a significant danger or increased the victim’s risk of harm.” *Id.*

We conclude the defendant’s dual convictions for especially aggravated kidnapping and premeditated first degree murder do not violate due process. The movement and confinement of Green was beyond that necessary to commit the murder. Furthermore, the additional confinement and movement prevented Green from summoning help and lessened the risk of detection. Therefore, the especially aggravated kidnapping was not “essentially incidental” to the premeditated murder.

IV. PROSECUTORIAL INCONSISTENCY

The defendant contends his convictions should be vacated because the state violated his due process rights by presenting evidence and arguments during his trial which were fundamentally inconsistent and inherently contradictory to evidence and arguments presented during the subsequent trial of co-defendant Prentiss Phillips. This issue is one of first impression in this state.

A. Law on Prosecutorial Inconsistency

In recent years, various courts have been asked to address situations in which prosecutors presented contradictory evidence and/or arguments to separate juries while trying co-defendants for the same offense. *See, e.g., United States v. Dickerson*, 248 F.3d 1036, 1043-44 (11th Cir. 2001), *cert. denied*, 536 U.S. 957 (2002); *Thompson v. Calderon*, 120 F.3d 1045, 1057-59 (9th Cir. 1997) (*en banc*), *vacated on other grounds*, 523 U.S. 538, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998); State v. Watkins, 659 N.W.2d 526, 532-33 (Iowa 2003). Although a number of jurists have indicated the government’s presentation of inconsistent evidence or argument is troubling, *see, e.g., Jacobs v. Scott*, 513 U.S. 1067, 115 S. Ct. 711, 130 L. Ed. 2d 618 (1995) (Stevens, J., dissenting); Drake v. Kemp, 762 F.2d 1449, 1470 (11th Cir. 1985) (Clark, J., concurring), *cert. denied*, 478 U.S. 1020 (1986); People v. Watts, 91 Cal. Rptr. 2d 1, 7 (Cal. Ct. App. 1999), *cert. denied*, 531 U.S. 887 (2000), no uniform body of law exists for addressing the issue. *See Anne Bowen Poulin, Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 Calif. L. Rev. 1423, 1425 (2001) (citations omitted).

In Smith v. Groose, one of the most frequently cited opinions regarding this issue, the United States Court of Appeals for the Eighth Circuit vacated defendant Smith's murder conviction, holding the prosecutor's use of factually contradictory theories in separate trials of different defendants violated the principles of due process. 205 F.3d 1045, 1052-53 (8th Cir.), *cert. denied sub nom. Gammon v. Smith*, 531 U.S. 985 (2000). The Eighth Circuit noted that prosecutors hold a "quasi-judicial" role in the justice system which demands that they act in the interests of justice rather than conducting themselves as mere advocates. *Id.* at 1049 (citations omitted). It clarified that its holding did not require the government to "present precisely the same evidence and theories in trials for different defendants." *Id.* at 1052. Further, it explained that the government's inconsistency "must exist at the core of the prosecutor's case against the defendants for the same crime" in order to justify relief. *Id.*

In the subsequent case of United States v. Paul, the Eighth Circuit, although recognizing the due process concerns in Smith, held inconsistent arguments by the prosecutor at the trials of the defendant and his co-defendant did not create a due process violation where the prosecution's theories were not "factually irreconcilable," and the defendant could have been convicted under either theory. 217 F.3d 989, 998-99 (8th Cir. 2000), *cert. denied*, 534 U.S. 829 (2001).

In the case at bar, the trial court relied upon State v. McKay, 680 S.W.2d 447 (Tenn. 1984), *cert. denied*, 470 U.S. 1034 (1985), and the companion cases of State v. Dicks, 615 S.W.2d 126 (Tenn.), *cert. denied*, 454 U.S. 933 (1981), and State v. Strouth, 620 S.W.2d 467 (Tenn. 1981), *cert. denied*, 455 U.S. 983 (1982), in finding no due process violation. These cases do involve fact patterns in which two co-defendants were both convicted for the same murder; however, they are distinguishable from the case *sub judice*. In McKay, defendants McKay and Sample unsuccessfully contended the evidence was insufficient to convict them because there was uncertainty as to which defendant fired the fatal shots which killed the victim. 680 S.W.2d at 449-50. However, unlike the instant case, McKay and Sample were tried jointly by the same jury. *Id.* at 450. No inconsistent evidence or arguments were presented by the state. In Dicks and Strouth, the co-defendants were tried separately, and each was convicted of the same murder. 615 S.W.2d at 127-28; 620 S.W.2d at 469. However, there was no indication the prosecution presented inconsistent evidence or arguments to the separate juries. Therefore, these cases do not control this issue.

We conclude the Eighth Circuit's approach in Smith is well-reasoned; therefore, we adopt the holding of that case in analyzing the issue presented by the defendant. We emphasize, as did the court in Smith, that such due process claims are unusual, will not often occur, and must exist at the core of the prosecution's case in order to justify relief. *See Smith*, 205 F.3d at 1052. We further conclude that a defendant must establish the prosecutorial inconsistencies led to a reasonable likelihood that the outcome of the trial would be different absent the inconsistencies. *See United States v. Bagley*, 473 U.S. 667, 677, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (noting failure to provide exculpatory evidence, a due process violation, requires a "reasonable likelihood" of a different outcome in order to secure relief); Poulin, *Prosecutorial Inconsistency*, 89 Calif. L. Rev. at 1471 (suggesting adoption of "reasonable likelihood" test).

We must first determine whether the state's theory in the instant case was contradictory to the evidence or arguments it presented in the subsequent trial of co-defendant Prentiss Phillips.

B. Defendant Robinson's Trial

During the trial of the defendant, the state presented the testimony of Jarvis Shipp to establish the defendant's role in the killing of the victim. Shipp testified the defendant was the "active chief of security over the entire city of Memphis." Shipp explained that as chief of security over the city, the defendant was the third highest ranking Gangster Disciple in Memphis behind T-Money and Kaos, and, at the time of the offenses, the defendant was actually second in command since T-Money was out of town. According to Shipp, the defendant instructed Prentiss Phillips and Kevin Wilkins to each select three men to transport the victim to a destination.

Shipp stated Phillips served as gang coordinator of Hurt Village, meaning Phillips was the "head guy over that section." In response to a series of questions posed by the state regarding the relative rank of the defendant and Phillips, Shipp responded that the defendant had the higher rank but noted that "on the incident that was the section we was in, it would be Prentiss Phillips." He also noted both the defendant and Phillips were giving orders regarding the beating of James.

The state also presented the testimony of Christopher James, who testified the defendant, whom he called "Shaun," had authority to issue orders. James also testified Phillips was the "coordinator." James did not testify regarding the defendant's authority or rank relative to that of Phillips.

In its closing argument at the end of the guilt phase, the state maintained the defendant was "calling the shots at the apartment"; he was "calling the orders [and] directing the people in the apartment"; he initiated actions which led to the victim's death; and, after Kaos left the apartment, he "became the ranking officer, . . . the ranking Gangster Disciple in [the] meeting." The state further argued there was "no doubt" that the defendant was the "chief of security over the whole city," and there was "no doubt" that the others followed his orders when he told them to "take care of it." Again, at the sentencing hearing on the defendant's especially aggravated robbery conviction, the state argued to the trial court that the evidence at trial showed he was the "most highly ranked individual at this meeting."

C. Co-Defendant Phillips' Trial

In the subsequent trial of Prentiss Phillips, the same prosecutors who tried the defendant's case presented proof that Phillips had a higher rank than the defendant. Natalie Black testified Phillips was coordinator of the Gangster Disciples in Hurt Village, and she assumed he was the highest ranking Gangster Disciple at the apartment on the night of the offenses. According to her, a chief of security had less authority than a coordinator. She stated she did not know the defendant's rank. She further testified she overheard Phillips say the victim had to be killed because he would talk if they allowed him to live. Natalie Black's sister, Nichole Black, likewise testified that Phillips was the coordinator, and she believed Phillips was in charge of the meeting. She further stated the victim asked Phillips, "[W]hy are you doing this to me?"

Christopher James testified at Phillips' trial that, as coordinator, Phillips had a higher rank than the defendant and was the highest ranking gang member at the meeting after Kaos left.³ James stated the defendant was chief of security for Watkins Manor. Although James initially testified he thought Phillips was in charge of the meeting, he later testified that the defendant was in charge and "called the shots." He then said Phillips issued orders to the defendant after Kaos left the meeting. According to James, both the defendant and Phillips selected individuals, whom the defendant ordered to remove the victim from the apartment.

In arguing against Phillips' motion for judgment of acquittal, the state commented, "[T]here's been proof that [Phillips] was . . . in control of this meeting, that he was the ranking Gangster Disciple there, that he was giving orders." In the final argument of the guilt phase of Phillips' trial, the state argued that Phillips, as coordinator of the Hurt Village Gangster Disciples, was "responsible primarily" because he called the meeting and was "the one who told them what to do." The state maintained in its closing rebuttal argument that the victim was killed "exclusively for [Phillips'] personal reasons."

During the penalty phase of Phillips' trial, the state presented the testimony of Jarvis Shipp, who was not called by the state as a witness in the guilt phase. Shipp testified Phillips gave orders for the victim to be beaten after the defendant ordered the victim be taken upstairs; Phillips chose Shipp and two other men to remove the victim from the apartment; and the victim was taken to the park where he was killed. Shipp stated Phillips instructed him to "make sure that the job was done." During an evidentiary objection by defendant Phillips, the state argued to the trial court that certain testimony by Shipp was relevant because Phillips "had the opportunity as the ranking officer to stop this action at any time." Shipp did not testify regarding the relative authority of Phillips and the defendant at the penalty phase of Phillips' trial. During closing argument, the state commented that Phillips was "the ranking" gang member present in the apartment, and that Phillips was "the one who made . . . choices" which led to the victim's death.

D. Comparison

During the hearing on the motion for new trial in the defendant's case, the prosecutor made the following comments:

Well, Your Honor, it is understandable how someone who's just reading transcripts and not been involved in all the hearings and seen how it's all been presented at every level to both Your Honor and to each one of the juries, could be, perhaps, confused.

However, the same hierarchy, the same chain of command was presented at every level of this trial.

. . . And the amount of authority, the power that was used by each one of these defendants was presented the same in each one of the trials.

. . .

Now, Prentiss had to answer to Gregory Robinson.

³James was never questioned about rank at defendant Robinson's trial.

...

The same facts, the same scenarios, the same cast of characters, the same potential power and who had to obey who[se] orders was presented to all of these jurors. They had these facts and they had sufficient evidence to find all of these people guilty of murder in the first degree.

...

As I say, I try to write notes on these things and I may have missed some points. I'll just submit that as far as the motion for a new trial goes in the Gregory Robinson matter, there was nothing in what was referred to in other trials, which diminishes the effectiveness or the sufficiency of the evidence in that trial, or negates it. They are not mutually exclusive. They all actually worked together.

...

We presented everything that we had in front of every jury that we thought was relevant to any case, as soon as we had it. And as Your Honor knows, a lot evolved during these cases, that was not evolved until during the cases.

And Your Honor's also very much aware that we presented the chain of command exactly the same in all of the cases, it never varied.

We agree with the prosecutor's statements in many respects. Both the defendant and Phillips were shown to have rank and the capability of giving orders. However, with all due respect to the state, we are unable to agree that the "chain of command [was presented] exactly the same in all of the cases."

Our review of these facts leads us to the determination that during the separate trials, the state presented some proof and arguments which were inconsistent, contradictory, and factually irreconcilable regarding the relative rank of the defendant and Phillips. Either the defendant outranked Phillips, or Phillips outranked the defendant. The state's theory and proof at the defendant's trial was that the defendant was the highest ranking Gangster Disciple; the state's theory and proof at Phillips' trial was that Phillips was the highest ranking Gangster Disciple. Both assertions could not be true. Further, we note that both cases were tried by the same two prosecutors.

We are also troubled by the presentation of witnesses by the state. Shipp testified at the defendant's trial that the defendant outranked Phillips; Shipp was not called as a witness during the guilt phase of Phillips' trial; during the penalty phase of Phillips' trial, Shipp did not testify as to the relative rank but stated Phillips told him to "make sure the job was done." Christopher James was not asked about the relative rank during the defendant's trial; during Phillips' trial, he testified Phillips outranked the defendant. Natalie Black was not called as a witness in the defendant's trial; during Phillips' trial, she testified Phillips was the highest ranking Gangster Disciple at the apartment. Nichole Black was called by the state as a rebuttal witness in the defendant's trial; she identified the defendant as being present at the apartment; she did not testify about relative rank; and her testimony was subsequently stricken due to the failure of the state to advise the defense of her identification of the defendant. During Phillips' trial, Nichole Black testified Phillips was in charge of the meeting.

We also note that the state in its brief in this court in State v. Phillips asserted on numerous occasions that Phillips was the “highest ranking member” present at the apartment. Although the evidence in Phillips’ trial certainly supported this argument, it is inconsistent with the state’s argument in its brief in the defendant’s case that the defendant was “senior in rank” to Phillips.

However, our review does not end with these observations. We must further determine whether the inconsistent evidence and theories were central to the state’s case. *See* Smith, 205 F.3d at 1052; Paul, 217 F.3d at 998-99.

E. Analysis of Prosecutorial Inconsistency

1. Especially Aggravated Kidnapping

The defendant was charged with especially aggravated kidnapping by means of using a deadly weapon and causing serious bodily injury. *See* Tenn. Code Ann. § 39-13-305(a)(1), (4). The state argued to the jury that the defendant committed the offense by directing the victim to be “snatch[ed] up,” beating the victim, possessing a deadly weapon, and later issuing orders which resulted in the victim’s death. The state did not overly emphasize the defendant’s alleged position as the highest ranking gang member present in seeking the especially aggravated kidnapping conviction. Both the defendant and Phillips were shown to be ranking members with authority to give orders. In overruling this ground in the order denying the motion for new trial, the trial court noted the following:

Though the evidence did not absolutely establish the identity of the leader at this meeting, there was ample evidence that the Defendant was a leader at that meeting. The fact that Prentiss Phillips, a co-defendant, was also identified as a leader at this meeting does not render the finding that this Defendant was a leader invalid.

We agree and conclude the state’s proof as to whether the defendant was the highest ranking or next to highest ranking member of the gang was not necessary to support this conviction, and, in all probability, the verdict would have been the same regardless. Therefore, because the state’s inconsistencies do not show a reasonable likelihood of a different result otherwise, we hold the state did not violate the defendant’s due process rights with regard to his conviction for especially aggravated kidnapping.

2. First Degree Murder

The effect of the state’s inconsistencies upon the premeditated first degree murder conviction raises a closer issue. In both cases, the state established that the defendant was a high ranking Gangster Disciple who gave orders to other members and personally participated in beating the victim. Again, the defendant’s alleged position as chief of security for Memphis and the highest ranking member at the apartment were not overly emphasized at his trial. We conclude the state’s inconsistent positions regarding the defendant’s rank, though troubling, were not central to the state’s case. Because there is no showing of a reasonable likelihood of a different result otherwise, we conclude there was no violation of the defendant’s due process rights.

F. Brady Violation

The defendant further suggests the state may have failed to disclose to him affirmative exculpatory evidence that Phillips was the highest ranking gang member and that it was Phillips who was ultimately responsible for the murder.

“[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution.” Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Our review of the record shows the defendant failed to present this argument to the trial court. The record is not sufficiently developed to allow this court to determine whether the state was aware of the inconsistency at the time of the defendant’s trial. This issue is waived. Alder, 71 S.W.3d at 303.

V. PROSECUTORIAL MISCONDUCT AND WITNESS JARVIS SHIPP

The defendant complains that prior to trial, Shipp attributed various acts to Prentiss Phillips, not to the defendant, and failed to identify the defendant as a co-perpetrator in these crimes. The defendant specifically alleges violations of Brady, 373 U.S. at 87, and Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). The defendant asserts that the prosecution withheld information of:

- (1) an informal “wink and a nod” . . . in exchange for Shipp’s testimony, by which the state would not seek the death penalty against him if he went to trial; and
- (2) the transcript of a hearing held on Shipp’s motion to suppress his own statement given to police (which had been denied), in which Shipp testified to a motive why he had confessed to the crime [which] was dramatically at odds with the claimed motives he (and the State’s prosecutors) told the jury were his “courageous” reasons to do so (remorse for the victim and a desire to make amends to the victim’s family).

The defendant claims he requested exculpatory information during pretrial discovery; the state failed to produce the information; and the information would have impeached Shipp’s credibility.

The duty to disclose exculpatory evidence extends to all “favorable information” irrespective of whether the evidence is admissible at trial. Johnson v. State, 38 S.W.3d 52, 56 (Tenn. 2001). The prosecution’s duty to disclose Brady material also applies to evidence affecting the credibility of a government witness, including evidence of any agreement or promise of leniency given to the witness in exchange for favorable testimony against an accused. Giglio, 405 U.S. at 154; Johnson, 38 S.W.3d at 56. While Brady does not require the state to investigate for the defendant, it does burden the prosecution with the responsibility of disclosing statements of witnesses favorable to the defense. State v. Reynolds, 671 S.W.2d 854, 856 (Tenn. Crim. App. 1984). However, this duty does not extend to information that the defense already possesses, or is able to obtain, or to information not in the possession or control of the prosecution or another governmental agency. State v. Marshall, 845 S.W.2d 228, 233 (Tenn. Crim. App. 1992).

In order to prove a due process violation under Brady, the defendant must show the state suppressed “material” information. Brady, 373 U.S. at 87; State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995). Undisclosed information is material “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” Bagley, 473 U.S. at 682 (citations omitted); Johnson, 38 S.W.3d at 58. Furthermore, a reasonable probability is a “probability sufficient to undermine confidence in the outcome.” *Id.* To establish materiality, an accused is not required to demonstrate “by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal.” Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). Therefore, “[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Id.*

A. “Wink and a Nod” Agreement

During the defendant’s trial, Jarvis Shipp testified on direct examination that the state had not made him any promises in exchange for his testimony and that he was testifying freely and voluntarily. On cross-examination, the following colloquy occurred between defense counsel and Shipp:

Q: . . . Let me ask you this. Do you expect some type – although there’s not a formal deal, do you expect some type of consideration for your testimony here today?

A: Yes, because the simple fact I’m facing the death penalty.

Q: Okay. So you do expect to gain something in your case by testifying here today, correct?

A: If it’s in the progress[sic].

. . .

Q: Okay. So let me ask you this. You feel like by telling the story that you’ve told today that that could help you, correct?

A: Yes.

. . .

Q: And you feel that if you help them convict Mr. Robinson that they might not seek that death penalty against you, right?

A: No, because they still – I still could go to trial and they still get the death penalty.

Q: But you’re hoping that they consider that, correct?

A: Yes.

Q: And you’re hoping that that consideration will result in you [sic] not looking at a death-penalty situation, correct?

A: Correct.

The defendant asserts that, in two subsequent trials, *i.e.*, State v. Antonio Jackson and State v. Prentiss Phillips, Jarvis Shipp acknowledged he had an agreement with the state. During co-defendant Antonio Jackson’s trial, Shipp initially denied that he had an agreement with the state. Later, however, he stated that his attorney had informed him that if he pled guilty, he would receive a sentence of life with the possibility of parole or less. Shipp further stated that, by testifying at

Jackson's trial, he was hoping for a better deal from the state. Later in co-defendant Prentiss Phillips' trial, Shipp admitted that he intended to enter a guilty plea as to his involvement in the events. He further stated, "I expect my life to be saved."

At the defendant's hearing on his motion for new trial, Shipp's attorney, Gerald Skahan, was called to testify regarding any agreement between his client and the state. The following colloquy occurred:

Q: Do you recall telling me when I asked what sort of agreement, if you had an agreement with the prosecutors, do you recall telling me basically it was a wink and a nod? . . .

A: I did use . . . those words but in a context that – like I testified to earlier, . . . I was fortunate enough to have somebody that was able to give testimony. . . .

What my personal opinion is about the way it's done, I think everybody knows what's happening. I think the defense lawyers know. I think the prosecutors know. And I think the defendants know from being in jail. But that's the way it's done here. . . . And as for Giglio and stuff like that, I think - - that's where I use it in the context of a wink and a nod; . . . I think everybody knows what's going to happen, but there is never an offer conveyed. There is never something saying that we will specifically do this. It's just at the end of every one of these trials, it works out. And that's what I mean by a wink and a nod.

In its order denying the defendant's motion for new trial, the trial court found that at the time of the defendant's trial, Shipp did not have a "deal" with the state, although Shipp may have hoped his testimony would lead to a "deal." It further found the state did not withhold evidence of a "deal" from the defendant, and the defendant thoroughly questioned Shipp at trial regarding a possible "deal." The trial court concluded the state did not violate Brady or Giglio. We agree with the trial court.

While Shipp may have hoped that his testimony would result in favorable treatment, the record does not establish that an agreement existed between the state and Shipp at the time of the defendant's trial. See Hartman v. State, 896 S.W.2d 94, 101-02 (Tenn. 1995). Furthermore, the fact that Shipp later pled guilty to a lesser charge of facilitation of the offenses does not establish the existence of a prior agreement. See State v. Williams, 690 S.W.2d 517, 525 (Tenn. 1985). Moreover, Shipp testified in this case that he indeed expected to receive favorable treatment in exchange for his testimony. In the absence of any proof that an agreement indeed existed at the time of the Shipp's testimony at the defendant's trial, this issue is without merit.

B. Transcript of Motion to Suppress

Next, the defendant asserts that the state, in violation of Brady, failed to provide a copy of the transcript from Shipp's hearing on the motion to suppress his statement to police. In that transcript, Shipp averred that his original statement to police was given out of fear that he would be placed in a pod with members of the Traveling Vice Lords. The defendant claims that Shipp's

motive of fear in giving the statement was at odds with his alleged noble motive of testifying at trial, which was “to tell the truth on my behalf and on behalf of the victim’s family.”

In its order denying the motion for new trial, the trial court found this information would not have affected the verdict. We likewise see little benefit that would have been derived from pointing out to the jury that Shipp’s motive for giving the pretrial statement was fear, whereas his alleged motive for testifying at trial was more noble. In fact, it was the defendant’s position at trial that the contents of Shipp’s pretrial statement, which did not mention any involvement by the defendant, was accurate.

Regardless, we conclude this transcript does not meet the Bagley test for materiality. The trial court noted Shipp testified he hoped to gain some favor with the state through his testimony. The trial court found that defense counsel had questioned Shipp extensively regarding inconsistencies between his statement to police and his testimony at trial. Accordingly, we conclude there was no reasonable probability that, had this evidence been disclosed, the result of the proceeding would have been different. *See Bagley*, 473 U.S. at 682. The failure to reveal this transcript did not undermine the confidence in the outcome of the trial. *Id.*⁴

The defendant also contends that by failing to provide the transcript to Shipp’s suppression hearing at the conclusion of Shipp’s testimony, the state violated Tennessee Rule of Criminal Procedure 26.2 by failing to provide what is commonly referred to as Jencks material.⁵

Rule 26.2(a) provides that:

After a witness other than the defendant has testified on direct examination, the trial court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and the defendant’s attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

A “statement” of a witness includes “[a] written statement made by the witness that is signed or otherwise adopted or approved by the witness.” Tenn. R. Crim. P. 26.2(g).

⁴The state also contends this transcript was a public record equally available to the defense, thus exempting it from the Brady requirements. *See Marshall*, 845 S.W.2d at 233. Several courts have concluded the failure to reveal public records does not violate Brady. *See, e.g., Kidwell v. State*, 444 S.E.2d 789, 792 (Ga. 1994) (concluding transcripts of trials of other defendants were public records and, therefore, the state was not required to disclose them); People v. Salgado, 635 N.E.2d 1367, 1376 (Ill. App. 1994) (holding that prior inconsistent statements contained in transcripts were a matter of public record and no less available to the defendant than to the state). The defendant contends the suppression hearing transcript was not readily available to defense counsel. We need not determine this issue in light of our holding that the transcript did not meet the Bagley materiality test.

⁵The holding in Jencks v. United States, 353 U.S. 657, 672, 77 S. Ct. 1007, 1 L. Ed. 2d 1103 (1957), and subsequent congressional action was incorporated into Rule 26.2 of both the Federal and Tennessee Rules of Criminal Procedure, requiring the production of statements of witnesses at trial.

Numerous federal courts have held that prior testimony does not qualify as Jencks material because the witness's statements are a matter of public record. *See, e.g., United States v. Chanthadara*, 230 F.3d 1237, 1254-55 (10th Cir. 2000) (holding that the prior trial testimony of an expert witness was not Jencks material), *cert. denied*, 534 U.S. 992 (2001); *United States v. Jones*, 160 F.3d 473, 479 n.5 (8th Cir. 1998) (noting that matters of public record do not fall within the scope of the Jencks Act); *United States v. Isgro*, 974 F.2d 1091, 1095 (9th Cir. 1992) (stating that "trial testimony is not within the scope of the Jencks Act"), *cert. denied*, 507 U.S. 985 (1993); *United States v. Harris*, 542 F.2d 1283, 1293 (7th Cir. 1976) (same), *cert. denied*, 430 U.S. 934 (1977). The Tennessee rule is similar to the federal rule. *See* Fed. R. Crim. P. 26.2. Here the defendant contends he did not have ready access to this transcript. We need not determine this issue. For the same reasons we found the transcript did not meet the materiality test under Bagley, we conclude the defendant was not prejudiced by any alleged violation of Rule 26.2.

VI. IDENTIFICATION ISSUES

The defendant asserts that numerous errors regarding a photograph array and identifications warrant a new trial. We disagree.

A. Suggestive Photograph Array

The defendant first asserts that the trial court erred in allowing a suggestive photograph array into evidence over objection. We disagree.

1. Suppression Hearing

During the suppression hearing, the defendant presented the testimony of Charles Poole, who stated he was also arrested and charged with the murder of Green. Poole testified that after he was arrested, Sergeant Ashton questioned him and showed him a photograph array. Poole testified that when he did not identify anyone, Sergeant Ashton pointed toward the photograph of the defendant. Poole stated that although he did not identify anyone in the array, he believed the officer wanted him to identify the defendant's photograph. Upon viewing the photograph array, Poole stated the array depicted five "dark-skinned" African-Americans and one "light skinned" African-American. He stated the defendant, who was depicted in photograph six, was the person with the light skin tone.

Sergeant William Ashton, the case coordinator, testified he prepared a photograph array and showed it to witnesses. He stated he arranged the array by using the defendant's photograph and other photographs of those who resembled the defendant. The officer then presented the array to various witnesses and asked them if they could identify anyone in the array. Sergeant Ashton testified he never suggested to witnesses whom they were to identify.

Sergeant Ashton described the defendant's skin tone as "light" and opined that all of the men depicted in the photograph array had light skin tones. He stated he showed the array to Shaun Washington and Christopher James, both of whom identified the defendant's photograph.

2. Trial Court's Findings

In denying the defendant's motion to suppress the identifications and photograph array, the trial court found that Poole's credibility was "about as narrow as it can get." The trial court then stated it examined the photograph array and described the array as six photographs of African-American males with either a "shaved head or very, very short cropped hair" and "lighter" skin tones. It found that the photograph array was not overly suggestive and that photograph six, which depicted the defendant, was not unique as compared to the other five photographs in the array. The trial court then concluded the photograph array was not suggestive, that the officer's actions were not suggestive, and the witnesses did not rely upon anything suggestive in making their identifications.

3. Standard of Review

The findings of fact made by the trial court at the hearing on a motion to suppress are binding upon this court unless the evidence contained in the record preponderates against them. State v. Ross, 49 S.W.3d 833, 839 (Tenn. 2001). Absent a showing by the defendant that the evidence preponderates against the judgment of the trial court, this court must defer to the ruling of the trial court. State v. Cribbs, 967 S.W.2d 773, 795 (Tenn.), *cert. denied*, 525 U.S. 932 (1998).

4. Analysis

Convictions based on eyewitness identification at trial following a pre-trial photographic identification will be set aside only if the photographic identification was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968). However, a pre-trial confrontation procedure may be unlawful if, under the totality of the circumstances, the procedure is unnecessarily suggestive. Stovall v. Denno, 388 U.S. 293, 301-02, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967).

Although it may be suggestive, an identification may satisfy due process as reliable and admissible when considering the totality of the circumstances. *See* State v. Brown, 795 S.W.2d 689, 694 (Tenn. Crim. App. 1990). This court must consider five factors in determining whether the in-court identification is reliable enough to withstand a due process attack despite the suggestiveness of the pre-trial identification. Neil v. Biggers, 409 U.S. 188, 199, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972); State v. Strickland, 885 S.W.2d 85, 88 (Tenn. Crim. App. 1993). These factors are: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the time between the crime and the confrontation. Strickland, 885 S.W.2d at 88 (citing Biggers, 409 U.S. at 199).

Based upon our review of the photograph array, we conclude that the evidence does not preponderate against the findings of the trial court. Although the complexion of the defendant is somewhat lighter than the complexions of other persons in the array, it was not impermissibly suggestive. This issue is without merit.

B. Out-of-Court Identification by Shaun Washington

As previously stated, defense counsel asked Sergeant Ashton on cross-examination who made identifications from the photograph array. Sergeant Ashton, in response to this question, stated Christopher James and Shaun Washington made identifications from the array. On re-direct examination by the state, Sergeant Ashton testified that, while obtaining Washington's statement, Washington was shown the photograph array and identified the defendant as the person he knew to be MacGreg. The defendant complains that this identification by a non-witness was inadmissible hearsay in violation of the Tennessee Rules of Evidence and the Confrontation Clauses of both the Tennessee and United States Constitutions.

In the present case, Sergeant Ashton's testimony as to what Washington told him during the viewing was hearsay, which is generally inadmissible. *See* Tenn. R. Evid. 801(c), 802. However, hearsay may be admissible if it consists of "[a] statement of identification of a person made after perceiving the person if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement." Tenn. R. Evid. 803(1.1). Had the evidence been solicited by the state and the defendant objected, it would have been inadmissible under Rule 803(1.1) because Washington did not testify at trial. *See State v. Stout*, 46 S.W.3d 689, 698 (Tenn.), *cert. denied*, 534 U.S. 998 (2001).

However, as the trial court noted in denying the defendant's motion for new trial, defense counsel specifically inquired as to who else made an identification upon viewing the photograph array. Sergeant Ashton responded Christopher James and Shaun Washington had made identifications. No objection was made by the defendant. Relief may not be accorded a party responsible for creating an alleged error. Tenn. R. App. P. 36(a). We further reject the defendant's contention that the trial court erroneously allowed the state's examination to exceed the proper scope of redirect examination. *See State v. Chearis*, 995 S.W.2d 641, 645 (Tenn. Crim. App. 1999) (holding scope of redirect examination is within the discretion of the trial court).

C. Nichole Black's Testimony

The defendant maintains the trial court erred in denying his motion for mistrial due to prosecutorial misconduct in the presentation of Nichole Black's testimony. During rebuttal, the state called Nichole Black, one of the sisters held in the apartment on the night of Vernon Green's murder. Black testified the defendant had been in the apartment on the night in question. On redirect examination, the prosecutor handed Black a photograph and asked her if she could identify the person in the photograph. Defense counsel objected to the identification, and a bench conference was held. The jury was excused, and upon further questioning by the trial court, it was discovered that the state had failed to inform defense counsel that Black could identify the defendant as having been present at the apartment on the night in question. The trial court ruled that because the state had failed to inform defense counsel that Black had made a prior identification of the defendant, her entire testimony would be stricken. The defendant's request for a mistrial was denied. The trial court specifically instructed the jury that they were to disregard all of Black's testimony.

The determination of whether to grant a mistrial rests within the sound discretion of the trial court. State v. Smith, 871 S.W.2d 667, 672 (Tenn. 1994). The reviewing court should not overturn that decision absent an abuse of discretion. State v. Reid, 91 S.W.3d 247, 279 (Tenn. 2002). Furthermore, a jury is presumed to follow the instructions of the trial court. See State v. Butler, 880 S.W.2d 395, 399 (Tenn. Crim. App. 1994).

Under ordinary circumstances, the jury instruction would be deemed adequate to alleviate any prejudice to the defendant. Here, however, the identity of the defendant as the person present at the apartment was indeed the most controverted issue at trial. Since identity was the crucial issue at trial, it becomes more crucial in trying to “unring” the bell after the jury heard this identification testimony. Furthermore, Ms. Black was arguably a more disinterested witness than James and Shipp, both of whom identified the defendant. Because we are remanding for a new trial due to other errors, we need not determine whether the failure to grant a mistrial was itself reversible error.

D. Failure to Grant a Continuance

The defendant challenges the trial court’s refusal to grant an overnight continuance to permit him to obtain a “tattoo expert.” At the motion for new trial hearing, this claim was expanded to include a witness regarding dental work. The defendant asserts that the denial prevented him from obtaining testimony which would have cast serious doubt upon the defendant’s identity as the person who gave the orders on the night of the murder.

The defendant asserts he was surprised by the testimony of his witness, Officer Parker, who testified on cross-examination by the state that a tattoo could possibly be altered. The defendant sought permission to find a tattoo expert who could examine his tattoos. The trial court denied the request, noting the testimony was from a defense witness, the cross-examination should have been anticipated by the defendant, and the testimony, at most, indicated a mere possibility of an alteration. At the time the request was made, the defendant had not identified any particular expert nor had his tattoos been examined by someone to determine whether they exhibited signs of alteration.

At the motion for new trial hearing, defense counsel stated Jason Owens, a tattoo artist, “would have examined the defendant’s tattoos, and he would have testified to the effect that [defense counsel had] represented and, also, as to his opinion as to whether there had been any cover-up or erasure of the defendant’s tattoos.” Defense counsel stated Owens would further testify that coverups or erasures are detectable. The defendant also presented a proffer from the records clerk of a dentist. The proffer indicated that the defendant had paid for gold crowns two months prior to the murder and gave no indication that the crowns contained letters or designs of the type attributed to “MacGreg.” As the trial court noted, there had been testimony to the fact that gold caps are removable, and the proffer did not address that possibility.

The decision whether to grant a motion for a continuance is a matter of discretion for the trial court, the denial of which will not be overturned on appeal absent a clear showing the trial court abused its discretion to the prejudice of the defendant. State v. Melson, 638 S.W.2d 342, 359 (Tenn. 1982), *cert. denied*, 459 U.S. 1137 (1983); Baxter v. State, 503 S.W.2d 226, 230 (Tenn. Crim. App. 1973). In order to establish an abuse of discretion, the complaining party must make a clear

showing of prejudice as a result of the continuance being denied. State v. Teel, 793 S.W.2d 236, 245 (Tenn.), *cert. denied*, 498 U.S. 1007 (1990).

The offer to secure dental testimony was not a basis for the motion for a continuance. Since an appellant cannot change theories from the trial court to the appellate court, this aspect of the issue is waived. Alder, 71 S.W.3d at 303; State v. Dooley, 29 S.W.3d 542, 549 (Tenn. Crim. App. 2000). As to the request for a tattoo expert, we note, as did the trial court, that the controverted testimony was elicited from Officer Parker, who was a defense witness. The witness only stated that it was possible that the defendant's tattoos could have been altered. No particular witness was identified at the time of the request for a continuance, nor had the defendant's tattoos been examined by a potential witness. The trial court had no assurance that a witness could be secured by the next day of trial. We also note that the basis of identification by the state's witnesses did not relate to tattoos or gold teeth. The issue of tattoos and gold teeth arose during the testimony of defense witnesses. Under these circumstances, we are unable to conclude the trial court abused its discretion in denying the request for a continuance.⁶

VII. USE OF THE VICTIM'S SKULL AND PHOTOGRAPHS DURING THE GUILT PHASE

The defendant contends the trial court erred in permitting the state to use the victim's skull and certain photographs during the guilt phase of his trial. Generally, the admission of evidence is a matter within the trial court's discretion, and a decision to admit or exclude evidence will not be disturbed on appeal absent a clear abuse of that discretion. State v. Carroll, 36 S.W.3d 854, 867 (Tenn. Crim. App. 1999). However, the trial court should exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Tenn. R. Evid. 403.

A. Display of the Victim's Skull

The defendant contends that although the skull was similarly used in the trials of co-defendants Wilkins and Jackson, the trial court ruled that introduction of the skull in the trial of co-defendant Phillips was irrelevant and inadmissible. The defendant asserts that the use of the skull of a victim must be highly relevant to the nature and type of injuries and the manner in which death occurred to be admissible. The state notes that our appellate courts have routinely upheld the admission of skulls during murder trials. *See, e.g., State v. Pike*, 978 S.W.2d 904 app. at 925 (Tenn. 1998), *cert. denied*, 526 U.S. 1147 (1999); State v. Cazes, 875 S.W.2d 253, 263 (Tenn. 1994), *cert. denied*, 513 U.S. 1086 (1995).

⁶We see no indication in the record that the tattoo artist, Jason Owens, had examined the tattoos of the defendant. The defendant correctly states in his brief that an *ex parte* request for funds to retain Owens was filed shortly prior to the motion for new trial hearing and denied by the trial court.

1. Trial Proceedings

During the defendant's trial and prior to the testimony of Dr. Deering, the defense objected to the use of the victim's skull during the trial. Defense counsel conceded there was "no question whatsoever that this was a premeditated execution-style killing." Defense counsel further maintained that the prejudicial effect outweighed any probative value due to the fact the exhibit was the victim's actual skull. The trial court found that the skull was relevant to establish that the murder was premeditated. It then concluded the probative value of the skull outweighed any prejudicial effect and permitted Dr. Deering to use it during his testimony. The trial court also instructed the jurors that the skull was only being used for demonstrative purposes and admonished them to refrain from allowing their emotions to influence their decision. The skull was not passed to the jury.⁷

2. Analysis

We begin our review of this issue by observing that when a defendant pleads not guilty to an offense, the state is generally entitled to prove every element of that offense, even if the defendant does not contest the relevant element. See State v. James, 81 S.W.3d 751, 761 (Tenn. 2002). Nonetheless, the proffered evidence, although relevant, must be excluded if its probative value is outweighed by the danger of unfair prejudice. *Id.* (concluding that the introduction of the defendant's prior convictions for violent crimes in his escape trial, when the defendant had offered to stipulate his incarceration, was reversible error even though incarceration was an essential element of the escape offense).

As argued by the state, our supreme court has held on multiple occasions that a cleaned and reconstructed skull is no more prejudicial or gruesome than that of a model or diagram. See, e.g., Pike, 978 S.W.2d at 925; Cazes, 875 S.W.2d at 263; State v. Morris, 641 S.W.2d 883, 888 (Tenn. 1982), *cert. denied*, 460 U.S. 1047 (1983). In Morris, the use of a skull to demonstrate the nature and type of injuries sustained by the victim was approved. 641 S.W.2d at 888. Similarly, in Cazes, the introduction of the skull was found to be proper as it aided in identifying the weapon used in the murder. 875 S.W.2d at 263.

In this case, the state sought introduction of the victim's skull to aid in understanding the testimony of the forensic pathologist/medical examiner by demonstrating the nature of the injuries inflicted, the amount of force used, and the manner of death. The use of the skull was also an issue presented on appeal in both the trials of Antonio Jackson and Kevin Wilkins. See State v. Jackson, 52 S.W.3d 661, 669 (Tenn. Crim. App. 2001) (concluding that although there was "little need for the skull," its use during trial did not affect the verdict); State v. Kevin Wilkins, No. W1999-01462-CCA-MR3-CD, 2000 Tenn. Crim. App. LEXIS 640, at **24-25 (Tenn. Crim. App. Aug. 18, 2000,

⁷In the subsequent trial of co-defendant Phillips, the trial court noted that the manner of death was not contested and ruled the skull inadmissible. Phillips, like the defendant, was convicted of premeditated first degree murder on the theory of criminal responsibility. State v. Phillips, 76 S.W.3d 1, 7 (Tenn. Crim. App. 2001). Neither Phillips nor the defendant was present at the scene of the murder.

at Jackson) (approving the use of the victim's skull during trial to establish premeditation), *perm. to app. denied* (Tenn. 2001).⁸

In the present case, the defendant was convicted of premeditated first degree murder based upon the theory of criminal responsibility. *See* Tenn. Code Ann. § 39-11-402(2). In both the Wilkins and Jackson trials, the state alleged both Wilkins and Jackson were present at the park where Green was killed. *See Jackson*, 52 S.W.3d at 665; *Kevin Wilkins*, 2000 Tenn. Crim. App. LEXIS 640, at **18-19. However, the state's theory at the defendant's trial was that although the defendant did not accompany the gang members to the park, he gave them orders to kill the victim. In *Jackson*, we saw "little need for the skull" due to Dr. Deering's extensive testimony and the photographs admitted into evidence. *Jackson*, 52 S.W.3d at 669. Here, we see *no* need for its introduction. The defendant was not present at the scene of the murder; there is no indication the defendant instructed anyone as to the manner of the killing; and the manner in which the victim was killed was undisputed. Rather, the defense concerned the defendant's lack of involvement in the offenses, not the nature of the crimes. Furthermore, the defendant's cross-examination of Dr. Deering was extremely limited and concerned the beatings prior to the killing. Although the skull had been "cleaned up," it had been "reconstructed." Dr. Deering explained that

there were so many pieces that they all couldn't fit in - they're too small to fit them all in. So I've got several bags that are just small pieces, mostly from the base of the skull, that we weren't able to fit together. I'm going to put these back.

We also note that Dr. Deering's use of the skull was not brief and covered several pages of narration in the trial transcript. More crucially, we must not only consider the skull's effect upon the murder conviction but must also consider its effect upon the especially aggravated kidnapping conviction.

Without any question, the display of the skull and the "several bags that are just small pieces" was improper with regard to both convictions. However, because there were other errors, we need not determine whether this error alone would justify relief.

B. Photo Exhibits

Tennessee courts follow a policy of liberality in the admission of photographs in both civil and criminal cases. *See State v. Banks*, 564 S.W.2d 947, 949 (Tenn. 1978) (citations omitted). Accordingly, "the admissibility of photographs lies within the discretion of the trial court" whose ruling "will not be overturned on appeal except upon a clear showing of an abuse of discretion." *Id.* Notwithstanding, a photograph must be found relevant to an issue at trial with its probative value outweighing any prejudicial effect before it may be admitted into evidence. *See State v. Vann*, 976 S.W.2d 93, 102 (Tenn. 1998), *cert. denied*, 526 U.S. 1071 (1999). Photographs of a corpse are generally admissible in murder prosecutions if they are relevant to the issues at trial. *Banks*, 564

⁸Additionally, the defendant alleges the skull's prejudice was apparent from the illness of a juror. The juror referred to by the defendant experienced a migraine headache and requested medication. The juror was then examined by medical personnel who confirmed that she indeed had a migraine. She was excused from the jury. We are unable to determine from the record that the introduction of the skull triggered the onset of the migraine headache.

S.W.2d at 950-51; *see* Tenn. R. Evid. 403. Notwithstanding this broad interpretation of admissibility, evidence which is not relevant to prove some part of the prosecution's case should not be admitted solely to inflame the jury and prejudice the defendant. Banks, 564 S.W.2d at 951.

The defendant asserts that certain close-up photographs of the victim, exhibits 8, 9, and 10, should not have been admitted because they were especially gruesome and inflammatory. The photographs are post-mortem pictures of the victim as he appeared when he was found in the park. The defendant further argues that, because the manner of death was not disputed, the photographs were unnecessary to establish premeditation. The trial court determined the photographs were relevant to the issues of the cause of death, where the victim was found, as well as the position in which the body was discovered, and were necessary to illustrate the testimony of many of the state's witnesses.

Exhibit 8 depicts the injury to the buttocks; Exhibit 9 depicts the injury to the back; and Exhibit 10 depicts the injury to the "right forehead." The photographs were relevant to supplement the testimony of Dr. Deering and to reveal the brutality of the attack and extent of force used against the victim. *See State v. Smith*, 868 S.W.2d 561, 576 (Tenn. 1993) (concluding the trial court did not abuse its discretion by admitting a photograph of the victim when the trial court stated that the photograph was relevant to show "'premeditation, malice and intent because of the multiplicity of these wounds and an obvious intent of whoever was inflicting these wounds'"), *cert. denied*, 513 U.S. 960 (1994). We further conclude Exhibits 8 and 9 are not inflammatory; thus, their probative value outweighed the danger of unfair prejudice. However, we reach a different conclusion relating to the photograph of the right forehead which is indeed graphic. It is highly inflammatory, and its probative value is outweighed by the danger of unfair prejudice. We need not determine whether this error alone would justify relief.

VIII. PROSECUTORIAL MISCONDUCT

The defendant alleges numerous instances of misconduct by the state. The state contends that in most instances the issue is waived due to the absence of a contemporaneous objection. The state further contends these allegations are otherwise without merit.

A. Witness Voucher

The defendant asserts that various prosecutorial comments made in relation to the testimony of Christopher James and Jarvis Shipp constituted improper vouching for their credibility and rendered his trial unfair. During the state's closing arguments, the prosecutor made comments regarding the honesty of both James and Shipp. The prosecutor also made comments during the direct-examination of Shipp and closing arguments regarding Shipp's bravery in testifying. The state responds, in part, that the defendant has waived this issue for failing to enter a contemporaneous objection. We agree with the state that the defendant has waived this issue due to his failure to proffer contemporaneous objections to the challenged remarks. *See State v. Green*, 947 S.W.2d 186, 188 (Tenn. Crim. App. 1997); *State v. Farmer*, 927 S.W.2d 582, 591 (Tenn. Crim. App. 1996); Tenn. R. App. P. 36(a). We further discern no plain error. *See* Tenn. R. Crim. P. 52(b).

B. The State Argued Facts not in Evidence

The defendant next complains of the following statement made by the prosecutor during closing argument: “[T]here was a murder, because there was an execution of a person, and the State has a duty to investigate that and do the best they can to determine who is responsible for that.” The defendant argues this statement transforms the prosecutor’s statements regarding the credibility of James and Shipp into “facts not in evidence.” The defendant further complains about the following argument made regarding Shipp: “[T]hat was a death sentence right then and there . . . [h]e’s got to watch his back everyday for the rest of his life.” In addition, he challenges the following statement made in reference to both witnesses: “[Chris James and Jarvis Shipp] haven’t conferred. . . . They haven’t talked. They haven’t met. . . . These men have not conferred in their testimony in any way.” Finally, the defendant states that the prosecutor improperly argued that, “[Sepacus Triplett], now that he is in the realm of confinement with other people who are involved in the Gangster Disciples organization, all of a sudden now he has a clear memory about his involvement.” The defendant contends no evidence exists in the record to support these statements.

Although we conclude all of these statements are reasonable inferences from the evidence, the defendant has waived any challenge to these issues by failing to raise a contemporaneous objection. *See* Tenn. R. App. P. 36(a). We further discern no plain error. *See* Tenn. R. Crim. P. 52(b).

C. The State Commented on the Defendant’s Decision not to Testify

During closing arguments in the guilt phase, the prosecutor stated

[Jarvis Shipp] said, I’m doing this, I’m telling you the truth to help me, but also doing this to help the victim’s family. Did you hear that from anybody else? – anybody else who sat in this chair and said, I pled to this, you know, I was there?

Did anyone else exhibit any remorse? Did anyone say, I want to do the right thing. I want to do – I want to assist this family in the grief that they’re exhibiting, that they’re feeling in this matter. No one else did.

The defendant now argues this was an improper remark on his election not to testify. *See Griffin v. California*, 380 U.S. 609, 613, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (holding prosecutor may not comment on the defendant’s failure to testify). Although these statements appear to properly relate to an attack on gang members who testified for the defense, the failure to contemporaneously object waives the issue. *See* Tenn. R. App. P. 36(a). Further, we discern no plain error. *See* Tenn. R. Crim. P. 52(b).

D. The State Presented Irrelevant Evidence Regarding the Victim

During its case-in-chief, the state presented the testimony of Christina Green, the victim’s sister. Ms. Green stated she and the victim had a “real close” relationship. She further stated she attended the victim’s funeral and that it was a “closed casket.” Defense counsel then objected, and the trial court sustained the objection, finding the information regarding the casket was not probative

to the state's case-in-chief. The prosecutor then asked Ms. Green if she missed her brother, and she responded affirmatively.

The defendant asserts that Christina Green's testimony was irrelevant to the issue of guilt or innocence and was not introduced for any other purpose but to inflame the passions of the jury. However, other than the testimony regarding the victim's coffin which the trial court sustained, the defendant did not contemporaneously object to this testimony. Therefore, any issue regarding Ms. Green's testimony in its entirety is waived. *See* Tenn. R. App. P. 36(a).

Next, the defendant alleges Dr. Deering's remark that the shotgun wound to the buttocks would have been painful was not relevant to a determination of guilt or innocence and only inflamed the jury. However, the defendant was charged with especially aggravated kidnapping, one element of which is serious bodily injury. *See* Tenn. Code Ann. § 39-13-305(a)(4). "Serious bodily injury" includes "extreme physical pain." *Id.* § 39-11-106(a)(34)(C). Accordingly, such testimony regarding the gunshot wound to the buttocks was relevant.

E. The State Made Improper Statements During *Voir Dire*

The defendant contends the state made improper statements to the jury during *voir dire*, which denied him a fair trial. During *voir dire*, the prosecutor, in discussing the different roles of the courtroom participants, stated:

On one matter that we all agree, we want a fair trial and impartial judicial proceeding. The defense wants that for their client, Mr. Robinson. But there's another person in this courtroom, ladies and gentlemen. Someone that you can't see. And that is the victim.

The defense objected and the trial court instructed the prosecutor to ask the jurors a question. The prosecutor then stated to the jury, "My question to you, . . . is that you keep that in mind throughout all your deliberations—there's one other person involved in this process." The defendant made no objection. The prosecutor then engaged in a lengthy discussion of the law and defined various legal terms.

The prosecutor's comments during *voir dire* had no effect on the result of the trial. These statements were minuscule compared to the lengthy *voir dire*. Furthermore, there is no indication that the prosecutor was acting with the intent to provoke unfair bias among the potential jurors. This issue lacks merit.

F. Victim's Identity

The defendant contends the state engaged in prosecutorial misconduct in seeking to suggest that he intended to obliterate the victim's identity despite the lack of supporting evidence and the trial court's instructions not to do so.

During the guilt phase of the trial, the state sought to introduce numerous photographs into evidence based upon its theory that the defendant intended that the victim's identity be obliterated. The trial court refused to admit the photographs based upon this theory. However, Sergeant Alvin Peppers testified that upon arriving at the scene, he was unable to identify any of the victim's features because "the face of the body was so mutilated." Upon objection by defense counsel, the trial court disallowed the introduction of a photograph depicting the victim's face due to its prejudicial effect but permitted Sergeant Peppers to testify regarding his observations while at the scene.

Prior to Dr. Deering's testimony, the trial court held a jury-out hearing to discuss photographs which would be introduced during the doctor's testimony. The trial court again prohibited the state from introducing photographs based upon this theory because no one had testified that the defendant had instructed the gang members to erase the victim's identity. However, the trial court further stated that the prosecutor could argue an inference based upon the evidence admitted.

We are unable to conclude the state engaged in prosecutorial misconduct. The trial court refused to admit numerous photographs based upon this theory. Furthermore, the prosecutor could properly argue an inference based upon Sergeant Peppers' testimony regarding the appearance of the victim at the scene and Dr. Deering's testimony regarding the location and effect of the various gunshot wounds. This issue is without merit.

IX. JURY INSTRUCTIONS - GUILT PHASE

The defendant claims that the trial court improperly charged the jury. Specifically, he alleges the jury instructions defining "intentional" and "knowing" conduct, direct and circumstantial evidence, and reasonable doubt were erroneous. We disagree.

Under the United States and Tennessee Constitutions, a defendant has a right to trial by jury. State v. Garrison, 40 S.W.3d 426, 432 (Tenn. 2000). A defendant also has a right to a correct and complete charge of the law, so that each issue of fact raised by the evidence will be submitted to the jury on proper instructions. *Id.* In evaluating claims of error in jury instructions, courts must remember that "jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning." Vann, 976 S.W.2d at 101 (quoting Boyde v. California, 494 U.S. 370, 380-381, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990)), *cert. denied*, 526 U.S. 1071 (1999). Therefore, we review each jury charge to determine if it fairly defined the legal issues involved and did not mislead the jury. *See State v. Hall*, 958 S.W.2d 679, 696 (Tenn. 1997), *cert. denied*, 524 U.S. 941 (1998).

A. Instruction on Intentionally and Knowingly

In instructing the jury on the elements of premeditated first degree murder, the trial court defined "intentionally" as, "A person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result. . . ." In regard to second-degree murder, the trial court similarly defined "intentionally" and further instructed the jury as follows:

“Knowingly” means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person’s conduct when the person is aware that the conduct is reasonably certain to cause the result.

The requirement of “knowingly” is also established if it is shown that the defendant acted intentionally.

The defendant cites as error the trial court’s instruction on “intentionally” for premeditated first degree premeditated murder and “knowingly” for second degree murder because they are result-of-conduct offenses. In support of his argument, the defendant relies upon this court’s decision in State v. Page, 81 S.W.3d 781 (Tenn. Crim. App. 2002), a decision filed long after the trial of this case. The defendant argues that this court’s decision in Page requires reversal in the present case as the trial court committed the same error by instructing the jury in the disjunctive on the definition of “intentionally” and “knowingly.” *Id.* at 788. Although the issue is moot due to our reversal on other grounds, we conclude the instructions constituted harmless error. *See State v. Allen Lee Dotson, Sr.*, No. M2001-01970-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 884, at *12 (Tenn. Crim. App. Oct. 21, 2002, at Nashville), *perm. to app. denied* (Tenn. 2003).

B. Instruction on Direct and Circumstantial Evidence

The defendant challenges the trial court’s use of the alternative pattern jury instruction on direct and circumstantial evidence. *See* T.P.I.—CRIM. 42.03(a) (4th ed. 1995). It provides in pertinent part as follows:

Direct evidence is those parts of the testimony admitted in court which referred to what happened and was testified to by witnesses who saw or heard [or otherwise sensed] what happened first hand. If witnesses testified about what they themselves saw or heard [or otherwise sensed], they presented direct evidence.

Circumstantial evidence is all the testimony and exhibits which give you clues about what happened in an indirect way. It consists of all the evidence which is not direct evidence. . . .

The defendant claims the instruction erroneously implies that “all evidence is direct evidence, except hearsay.” Here, a “commonsense understanding of the instructions in the light of all that has taken place at the trial likely . . . prevail[ed] over technical hairsplitting.” Boyd, 494 U.S. at 381. We conclude that there is no reasonable likelihood that the jurors interpreted the trial court’s instructions so as to prevent proper consideration of direct and circumstantial evidence.

C. Reasonable Doubt Instruction

The defendant argues that the instruction provided by the trial court erroneously defined reasonable doubt. The trial court provided the following instruction on reasonable doubt:

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a captious, possible or an imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the offense.

See T.P.I.—CRIM. 2.03 (4th ed. 1995).

Our courts have upheld the constitutionality of the language contained in this reasonable doubt instruction. See, e.g., State v. Bush, 942 S.W.2d 489 app. at 521 (Tenn.), *cert. denied*, 522 U.S. 953 (1997); Pettyjohn v. State, 885 S.W.2d 364, 365 (Tenn. Crim. App. 1994). Accordingly, this issue is without merit.

X. LESSER-INCLUDED OFFENSES

In his brief, the defendant primarily argues that the trial court erred in failing to instruct the jury on facilitation and solicitation as lesser-included offenses of criminal responsibility for premeditated first degree murder. However, the defendant further notes within his brief that “the trial court did not instruct the jury on either facilitation or solicitation of murder *or facilitation of especially aggravated kidnap[p]ing*.” (Emphasis added). We will address the trial court’s failure to instruct the jury on facilitation and solicitation as lesser-included offenses of both first degree murder and especially aggravated kidnapping.

A. Lesser-Included Offenses Generally

In fairness to and in defense of the trial court, we note that this trial occurred in 1998, prior to our supreme court’s decision in State v. Burns, 6 S.W.3d 453 (Tenn. 1999). We further note that it was highly unlikely the trial court could have foreseen the impact of Burns and the cases that followed Burns. However, our courts have applied Burns retroactively to cases which were either in the appellate “pipeline” or pending when the Burns decision was announced. See, e.g., State v. Stokes, 24 S.W.3d 303, 305 (Tenn. 2000); State v. Jumbo Kuri, No. M1999-00638-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 410, at **10-12 (Tenn. Crim. App. May 25, 2000, at Nashville). Accordingly, in examining this issue, we must apply the standards set forth in Burns and the cases that have interpreted Burns.

In applying the lesser-included offense doctrine, three questions must be addressed: “(1) whether an offense is a lesser-included offense; (2) whether the evidence supports a lesser-included offense instruction; and (3) whether an instructional error is harmless.” State v. Richmond, 90 S.W.3d 648, 659 (Tenn. 2002) (quoting State v. Allen, 69 S.W.3d 181, 187 (Tenn. 2002)). If an offense is found to be a lesser-included offense, the court must next ascertain “whether the evidence justifies a jury instruction on the lesser-included offense.” State v. Bowles, 52 S.W.3d 69, 75 (Tenn. 2001) (citations omitted). To do so, the court must first determine whether there is evidence that “reasonable minds” could accept to establish the lesser-included offense. Burns, 6 S.W.3d at 469. The court must view the evidence liberally in a light most favorable to the existence of the lesser-

included offense without judging its credibility. State v. Ely, 48 S.W.3d 710, 722 (Tenn.), *cert. denied*, 534 U.S. 979 (2001); Burns, 6 S.W.3d at 469. Finally, the court must determine if the evidence is “legally sufficient” to support a conviction for the lesser-included offense. Burns, 6 S.W.3d at 469.

The evidence, not the theories of the parties, determines whether an instruction on a lesser-included offense should be given. Allen, 69 S.W.3d at 188. Furthermore, the decision to convict on a lesser-included offense should not be taken from the jury simply because the element distinguishing the greater offense from the lesser offense is “uncontroverted.” *Id.* at 189. If the evidence justifies an instruction, the failure to charge the offense is error even though the evidence was also sufficient to support the greater offense. Burns, 6 S.W.3d at 472.

Harmless error relating to the failure to charge lesser-included offenses must be shown “beyond a reasonable doubt.” Ely, 48 S.W.3d at 727. The proper inquiry is “whether it appears beyond a reasonable doubt that the error did not affect the outcome of the trial.” Allen, 69 S.W.3d at 191. In making the harmless error determination, this court must “conduct a thorough examination of the record, including the evidence presented at trial, the defendant’s theory of defense, and the verdict returned by the jury.” *Id.*

In sum, when a reviewing court determines whether a lesser-included offense ought to be charged, the evidence clearly controls. If there is evidence sufficient to support a conviction for a lesser-included offense, we hold that a trial court must charge that offense. The determinative test being whether there is evidence sufficient such that a jury *could* convict on that lesser-included offense. If a jury could convict, no matter how improbable, it is error not to charge that lesser-included offense. However, in deciding whether it was harmless beyond a reasonable doubt not to charge a lesser-included offense, the reviewing court must determine whether a reasonable jury *would* have convicted the defendant of the lesser-included offense instead of the charged offense. In other words, the reviewing court must determine whether it appears beyond a reasonable doubt that the trial court’s failure to instruct on the lesser-included offense did not affect the outcome of the trial. Allen, 69 S.W.3d at 191.

Richmond, 90 S.W.3d at 662 (emphasis in original).

B. First Degree Murder

The trial court charged second degree murder as a lesser-included offense of premeditated first degree murder. The defendant contends the trial court erred in failing to charge facilitation and solicitation as lesser-included offenses of premeditated first degree murder.

1. Facilitation

Our supreme court has determined that facilitation is a lesser-included offense when a defendant is charged with criminal responsibility for the conduct of another. State v. Fowler, 23

S.W.3d 285, 288 (Tenn. 2000); Burns, 6 S.W.3d at 470. In order for reasonable minds to find the defendant guilty of facilitation of premeditated first degree murder, the jury would be required to conclude that the defendant, although not acting with the intent to promote premeditated murder nor benefit in the results, furnished substantial assistance to the principal actors “knowing that [they] inten[ded] to commit [premeditated first degree murder].” *See* Tenn. Code Ann. § 39-11-403(a).

The failure to charge facilitation was error. *See Allen*, 69 S.W.3d at 188 n.2 (noting that “the same evidence may support instructions on both criminal responsibility and facilitation”). Upon reviewing the record, we conclude that the jury could have found that the defendant did not share the intent to commit premeditated first degree murder with the principal or principals; however, it could have found that the defendant knew the gang members intended to commit first degree murder and provided them with substantial assistance. James testified that after the defendant beat Green, the defendant escorted the victim upstairs. Shipp testified that while Green was upstairs, numerous gang members forced the victim to lie down on the floor and pointed guns at his head “like if he moved, they was going to shoot him.”

In addition, James acknowledged the truth of his prior statement to law enforcement in which he said Kaos, just prior to leaving the apartment, stated, “You all need to take care of this,” and Kaos told Jarvis Shipp, “What you all do now is personal.” A jury could have reasonably inferred that it was “personal” to Shipp and/or Prentiss Phillips because Shipp was involved in the prior altercation with the Vice Lords, and the altercation occurred in Phillips’ territory of responsibility. Thus, a jury could infer that the defendant did not share in the others’ intent to kill because it was not “personal” to the defendant; nonetheless, the defendant knew of their intent to kill and substantially assisted by ordering that the victim be taken to a secluded area. Consequently, the evidence would support the lesser offense of facilitation of premeditated first degree murder.

Furthermore, we are unable to conclude that it did not affect the outcome of the trial. Although the defendant’s primary defense at trial was that he was not present and did not participate in the events, defense counsel stated during opening argument that even if the proof established the defendant was present at the apartment, such evidence would further establish that Phillips was in charge of the meeting and gave orders. During trial, defense counsel cross-examined both James and Shipp regarding the gang members who gave orders and the meaning of those orders. Moreover, the evidence presented at trial, particularly Shipp’s testimony regarding the defendant’s order to take the victim “fishing,” supports an instruction on facilitation.

The state contends any error was harmless because the jury convicted the defendant of premeditated first degree murder, an offense greater than second degree murder, the immediate lesser-included offense on which the jury was instructed and which has a less culpable mental state. However, our supreme court has noted that “facilitation is a separate and distinct theory of liability from that of a principal offender or someone who is criminally responsible for the conduct of another.” State v. Locke, 90 S.W.3d 663, 672 (Tenn. 2002). By failing to instruct the jury on facilitation, the trial court provided the jury with only two options: (1) either convict the defendant based upon criminal responsibility, or (2) acquit him outright. The jury was not provided with the

opportunity to consider the defendant's role as a facilitator rather than as a party to the offense. *See id.* at 672-73. Accordingly, any error would not be harmless beyond a reasonable doubt.⁹

2. Solicitation

Just as facilitation is a lesser-included offense of criminal responsibility to commit first degree murder, so is solicitation. *See Burns*, 6 S.W.3d at 471. A person may be convicted of solicitation of an offense if that person "by means of oral, written or electronic communication, directly or through another, intentionally commands, requests or hires another to commit a criminal offense, or attempts to command, request for hire another to commit a criminal offense, with the intent that the criminal offense be committed. . . ." Tenn. Code Ann. § 39-12-102(a). The offense requires both "an intent to solicit and an intent that the crime solicited be committed." *Garrison*, 40 S.W.3d at 432. One may be convicted of solicitation whether the intended crime does or does not occur; however, one may not be convicted of both solicitation and the completed offense. *See Burns*, 6 S.W.3d at 471; Tenn. Code Ann. § 39-12-102, Sentencing Commission Comments.

Just as we did with facilitation, we conclude the failure to charge solicitation to commit premeditated first degree murder was reversible error.

B. Especially Aggravated Kidnapping

The trial court instructed the jury on aggravated kidnapping and kidnapping as lesser-included offenses of especially aggravated kidnapping. The defendant now contends the trial court erred in failing to instruct the jury on facilitation and solicitation as lesser-included offenses of especially aggravated kidnapping.

1. Facilitation

Under the *Burns* test, facilitation is a lesser-included offense of especially aggravated kidnapping based upon a theory of criminal responsibility. *See Burns*, 6 S.W.3d at 470. We conclude reasonable minds could accept facilitation as a lesser-included offense of especially aggravated kidnapping in this case, and the evidence was legally sufficient to support a conviction for facilitation of especially aggravated kidnapping. The proof established that the defendant instructed various gang members to bring Green to the apartment. While at the apartment, the defendant beat Green and ordered other gang members to take Green "fishing." While this proof establishes the defendant directly participated in the kidnapping of Green, the jury could conclude that when the defendant ordered the gang members to take Green "fishing," he did not intend the kidnapping to be especially aggravated. Rather, the jury could conclude defendant knowingly offered substantial assistance to the gang members who committed especially aggravated kidnapping. Therefore, the trial court erred in failing to instruct the jury on facilitation as a lesser-included offense.

⁹We note that in Phillips' trial, the trial court instructed the jury on facilitation as a lesser-included offense; nevertheless, the jury convicted Phillips of premeditated first degree murder based upon criminal responsibility.

Furthermore, we are unable to conclude this error did not affect the verdict. As discussed above, while the defendant's primary defense concerned identity, defense counsel questioned various witnesses regarding the defendant's participation and instructions. In addition, the jury was only given the opportunity to consider the defendant's role under a theory of criminal responsibility rather than his role as a facilitator. Accordingly, the trial court's failure to instruct the jury on facilitation was not harmless.

2. Solicitation

Under the Burns test, solicitation is also a lesser-included offense of especially aggravated kidnapping based upon a theory of criminal responsibility. *See Burns*, 6 S.W.3d at 466-67. We further conclude reasonable minds could accept solicitation as a lesser-included offense of especially aggravated kidnapping in this case, and the evidence was legally sufficient to support a conviction for solicitation to commit especially aggravated kidnapping. By examining evidence that the defendant ordered gang members to retrieve Green and instructed gang members to take Green "fishing," the jury could have found the defendant commanded the gang members to commit especially aggravated kidnapping with the intent that the offense be committed. Therefore, the trial court erred in failing to instruct the jury on solicitation. Moreover, based upon the evidence presented at trial, we are unable to conclude this error was harmless beyond a reasonable doubt. *See id.* at 472. Like the situation in Burns, there was proof presented at trial that the defendant solicited others to commit the offense and that the offense was completed. *Id.* at 471-72. Accordingly, we are unable to conclude the failure to instruct the jury regarding solicitation did not affect the verdict.

XI. JURY MISCONDUCT

The defendant complains that his right to an impartial jury was violated when juror Gina Boyd was untruthful during *voir dire*, and, despite the sequestration order, Boyd had contact with a person outside the jury.

A. Bias/Prejudice

During *voir dire*, Boyd stated she worked "intake" as a deputy jailer in Shelby County. She denied knowing the defendant or anything about the case. Boyd stated she would be able to be fair and impartial in hearing all the evidence. During the motion for new trial, Boyd testified that although there were times when she was in different areas of the jail, she did not recall seeing the defendant in the jail.

Boyd stated that during the trial, she noticed an arm band on the defendant's wrist and realized he was an inmate, although she still did not know where he was housed. She did not return to the jail until after the conclusion of the trial. Boyd maintained she never had supervisory authority over the defendant at the Shelby County Jail.

Defense counsel subsequently presented jail records which established that on October 8, 1998, Boyd was temporarily assigned to work in the pod where the defendant was housed for a period

of three hours. Although the duty log sheet reflects that a head count may have been taken while Boyd was working in the pod, there is no indication as to who took the head count.

The burden is on the defendant to establish a *prima facie* case of juror bias. State v. Akins, 867 S.W.2d 350, 355 (Tenn. Crim. App. 1993). If a juror intentionally fails to disclose information on *voir dire* which might indicate partiality, a presumption of prejudice arises. *Id.*

The trial court found there was no “nexus” shown to exist between the defendant and the juror. The trial court further found there was no indication Boyd recognized the defendant. We conclude that the trial court’s ruling is supported by the evidence. This issue is without merit.

B. Separation of Sequestered Jury

At the hearing on the motion for new trial, juror Boyd testified that after being selected for the jury, she advised her mother she was selected for a “profile” murder case and was upset. Defense counsel stated they had interviewed the juror’s mother, who stated her daughter came home in order to secure clothing for her sequestration and said she was “extremely upset” in having to serve on “a high profile gangster case.”

The trial court found that juror Boyd had already testified she was upset and told her mother she was sitting on a “profile” murder case. Thus, the court saw no relevance in the mother’s proposed testimony. The defendant made no formal proffer of the mother’s testimony.

Although we question whether this issue has been properly preserved due to the failure to make a formal proffer of the mother’s proposed testimony, we find it without merit. Once separation of a sequestered jury has been shown by the defendant, the state has the burden of showing that such separation did not result in prejudice to the defendant. State v. Bondurant, 4 S.W.3d 662, 672 (Tenn. 1999). Here, the record supports the finding by the trial court that there was no showing of prejudice even if the mother testified in accordance with defense counsel’s declarations. This issue lacks merit.

XII. THIRTEENTH JUROR/ JUDGMENT OF ACQUITTAL

The defendant asserts that the trial court, acting in its capacity as the thirteenth juror, should have granted a new trial because the guilty verdicts were contrary to the weight of the evidence. Alternatively, he asserts that the trial court should have granted his motion for judgment of acquittal.

Tennessee Rule of Criminal Procedure 33(f) provides that “[t]he trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence.” When a trial court makes a determination following Rule 33(f), the court is acting as thirteenth juror. See State v. Gillon, 15 S.W.3d 492, 500 (Tenn. Crim. App. 1997). In the instant case, the trial court expressly approved the verdict as thirteenth juror in the order overruling the motion for new trial. Contrary to the defendant’s argument, the trial court is not required to delete from its consideration evidence that might later be found to be inadmissible.

The defendant also argues that the trial court erred by failing to grant his motion for judgment of acquittal. *See* Tenn. R. Crim. P. 29. This court has noted that “[i]n dealing with a motion for a judgment of acquittal . . . the trial judge is concerned only with the legal sufficiency of the evidence and not with the weight of the evidence.” State v. Hall, 656 S.W.2d 60, 61 (Tenn. Crim. App. 1983). The standard for reviewing the denial or grant of a motion for judgment of acquittal is analogous to the standard employed when reviewing the sufficiency of the convicting evidence after a conviction has been imposed. *See* State v. Ball, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998). Thus, our review of this issue is encompassed within our previous review of the sufficiency of the evidence.

XIII. CUMULATIVE ERROR

The defendant contends that cumulative error warrants relief from the convictions. Having concluded the defendant is entitled to relief based upon the failure to charge lesser-included offenses, we need not address the issue of cumulative error.

XIV. SENTENCE FOR ESPECIALLY AGGRAVATED KIDNAPPING

The defendant does not challenge the length of his twenty-five-year sentence for especially aggravated kidnapping. However, he argues the trial court’s order that it run consecutively to the sentence of death is flawed in that the trial court failed to make the requisite findings for consecutive sentencing. *See* State v. Imfeld, 70 S.W.3d 698, 708-09 (Tenn. 2002); State v. Lane, 3 S.W.3d 456, 460 (Tenn. 1999); State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995).

A trial court may impose consecutive sentencing upon a determination that one or more of the criteria set forth in Tennessee Code Annotated section 40-35-115(b) exist. This section permits the trial court to impose consecutive sentences if the court finds, among other criteria, that “the defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high.” Tenn. Code Ann. § 40-35-115(b)(4). However, before ordering the defendant to serve consecutive sentences on the basis that he is a dangerous offender, the trial court must find that the resulting sentence is reasonably related to the severity of the crimes and necessary to protect the public against further criminal conduct. *See* Imfeld, 70 S.W.3d at 708-09; Wilkerson, 905 S.W.2d at 939.

Based on our review of the record, we conclude the trial court’s findings parallel the requirements of the statute addressing consecutive sentencing and Wilkerson. *See* Tenn. Code Ann. § 40-35-115(b)(4); Wilkerson, 905 S.W.2d at 938-39. The trial court imposed consecutive sentencing based on its finding that the defendant was a dangerous offender. It further found the resulting sentence was reasonably related to the severity of the crimes due to the manner in which the victim was beaten and humiliated prior to his death. The trial court also specifically found society needed to be protected from the defendant. The trial court’s findings are supported by the record based on the defendant’s conduct.

ANALYSIS OF ISSUES PRESENTED - PENALTY PHASE

We have previously concluded that the case must be remanded for a new trial. Nevertheless, it is our responsibility to address the remaining issues. *See State v. Pendergrass*, 13 S.W.3d 389, 395 (Tenn. Crim. App. 1999) (citing *Jacobs v. State*, 224 Tenn. 106, 107, 450 S.W.2d 581, 582 (1970)), *cert. denied*, 404 U.S. 910 (1971). However, we will abbreviate our examination of these issues except for those issues we feel have merit. *See generally, Jacobs*, 224 Tenn. at 107, 450 S.W.2d at 582 (citing *Grove v. State*, 211 Tenn. 414, 365 S.W.2d 292, 293 (1963)).

XV. CHALLENGES TO THE (i)(5) AND (i)(7) AGGRAVATORS

The defendant challenges the constitutionality of both the (i)(5) and (i)(7) aggravating factors. *See* Tenn. Code Ann. § 39-13-204(i)(5), (7). We disagree with the defendant's contentions.

A. (i)(5) Aggravator - Unconstitutionally Vague and Overbroad

The defendant argues that the "heinous, atrocious, or cruel" aggravator is vague and overbroad. However, our supreme court has rejected this argument. *State v. Keen*, 31 S.W.3d 196, 211 (Tenn. 2000), *cert. denied*, 532 U.S. 907 (2001).

He further asserts that the jury instruction, as given, is not a unitary instruction. Our supreme court has previously stated that the phrase "especially heinous, atrocious, or cruel" is a unitary concept, *State v. Van Tran*, 864 S.W.2d 465, 479 (Tenn. 1993), *cert. denied*, 511 U.S. 1046 (1994), which "may be proved under either of two prongs: torture or serious physical abuse," *Keen*, 31 S.W.3d at 209 (citations omitted). Further, our state supreme court has previously found the defendant's argument that the jury charge deprived him of a unanimous jury verdict to be without merit. *State v. Sims*, 45 S.W.3d 1, 18 (Tenn.), *cert. denied*, 534 U.S. 956 (2001).

B. (i)(5) Aggravator - Failing to Meaningfully Narrow Pool

The defendant argues that the (i)(5) aggravator, either alone or combined with the (i)(7) aggravator, fails to meaningfully narrow the class of death eligible defendants. The Tennessee Supreme Court has rejected this argument. *See Terry v. State*, 46 S.W.3d 147, 159 (Tenn.), *cert. denied*, 534 U.S. 1023 (2001).

C. (i)(5) and (i)(7) Aggravators - Vicarious Application

The defendant contends the (i)(5) aggravator cannot be vicariously applied to one who did not personally participate in the murder. In *Owens v. State*, 13 S.W.3d 742, 760 (Tenn. Crim. App. 1999), *perm to app. denied* (Tenn. 2000), *cert. denied*, 531 U.S. 846 (2000), this court approved the vicarious application of the (i)(5) aggravating factor. In *Johnson v. State*, our supreme court declined to vicariously apply the (i)(3) aggravator, great risk to others, specifically noting it was "[u]nlike" the "(i)(5) aggravator." 38 S.W.3d 52, 63 (Tenn. 2001); *see* Tenn. Code Ann. § 39-13-204(i)(3). Nevertheless, the court noted that it did "not necessarily adopt" the vicarious application of (i)(5) as

set forth in Owens. Johnson, 38 S.W.3d at 63 n.17. Until such time as our supreme court overrules Owens, we conclude the (i)(5) aggravator can be vicariously applied.

The defendant also maintains the (i)(7) felony murder aggravating circumstance may not be applied to impose the death penalty upon a defendant who did not personally kill the victim. *See* Tenn. Code Ann. § 39-13-204(i)(7). In Tison v. Arizona, the United States Supreme Court held “major participation in the felony committed, combined with reckless indifference to human life” is constitutionally sufficient to impose the death penalty upon a non-triggerman. 481 U.S. 137, 158, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987). Our state supreme court has followed Tison. *See State v. Taylor*, 774 S.W.2d 163, 166-67 (Tenn.), *cert. denied*, 493 U.S. 945 (1989). Accordingly, we conclude the defendant’s argument is without merit.

XVI. DEFENDANT’S PRIOR ARREST

The defendant next asserts the trial court erred in failing to grant a mistrial when, during the sentencing phase, the state improperly asked a defense witness about the defendant’s “prior arrest.” The defendant presented his sister’s testimony concerning his relationship with his family. On cross-examination, the state asked the defendant’s sister whether she was aware of the defendant’s prior arrest. The trial court sustained the defendant’s objection and instructed the jury to disregard the question and answer.

Although we have difficulty understanding why a prosecutor would ask such a question in the penalty phase of a capital trial without prior court approval, we fail to find any resulting prejudice in light of the trial court’s prompt curative instruction.

XVII. PREJUDICIAL INFORMATION REACHING THE JURY

A. List of Aggravating Circumstances

The defendant argues that the trial court improperly read to the jury all the possible aggravating circumstances during jury selection and not just the two relied upon by the state. The record reflects that the trial court did recite to the venire during the jury selection process the entire list of available statutory aggravating circumstances.

It is error for the trial court to instruct the jury on inapplicable aggravating circumstances. State v. Blanton, 975 S.W.2d 269, 281(Tenn. 1998), *cert. denied*, 525 U.S. 1180 (1999). However, the entire list of aggravating circumstances was not submitted to the jury as part of the instructions prior to deliberations. It was simply part of the explanatory portion of the trial court’s discussion with the venire. At the close of the proof at the sentencing phase, the jury was properly instructed only as to the two aggravating factors relied upon by the state. This issue is without merit.

B. Use of Especially Aggravated Kidnapping to Enhance Punishment

The defendant complains that the trial court permitted the prosecution to improperly suggest that the felony murder aggravator, which was based upon the underlying especially aggravated

kidnapping, should be given extra weight against any mitigators. Specifically, the defendant cites to the state's argument, "You've already come to this determination that there was, indeed, an especially aggravated kidnapping and that there was, indeed, a murder. The other one is the heinous, atrocious, and cruel." This argument is misplaced. The prosecution was merely reiterating to the jury that they had found during the guilt phase the elements of especially aggravated kidnapping, the underlying felony in the (i)(7) aggravator.

The defendant also argues that the use of the same "serious bodily injury" to the victim to enhance kidnapping to especially aggravated kidnapping and to apply the (i)(7) aggravator was "double counting," which violated double jeopardy. Initially, we note that the felony murder aggravator is triggered by a murder in perpetration of a "kidnapping"; it is not required to be an "especially aggravated kidnapping." See Tenn. Code Ann. § 39-13-204(i)(7). Regardless, there is no double jeopardy violation. See State v. Stout, 46 S.W.3d 689, 706 (Tenn.), *cert. denied*, 534 U.S. 998 (2001).

C. Failure to Limit the State's Aggravators to (i)(5)

The defendant asserts that the trial court improperly permitted the state to rely upon two aggravating circumstances after defense counsel had detrimentally relied upon the state's opening argument of the penalty phase indicating it was relying upon only the (i)(5) aggravator. The state indeed only mentioned the "heinous, atrocious, or cruel" aggravator in its opening statement. However, prior to the defendant's proof, the trial court heard argument on this issue and ruled the state was not limited to only one aggravating factor. It further noted the state had given proper notice of both aggravators. We agree with this ruling and discern no undue prejudice to the defendant.

XVIII. PROHIBITION FROM CONSIDERING MITIGATING EVIDENCE

The defendant contends the trial court unconstitutionally prevented the sentencing jury from considering relevant mitigating evidence by excluding consideration of evidence of the defendant's character and record.

A. Instruction to Jury Regarding Mitigating Factors

The defendant complains of the following instruction regarding consideration of mitigating evidence:

Any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing; that is, you shall consider any aspect of the circumstances of the offense favorable to the defendant which is supported by the evidence.

The defendant asserts that by failing to instruct the jury that it may also consider "any aspect of the defendant's character or record," this instruction erroneously limited the jury to mitigating evidence related to the circumstances of the offense, and, in effect, the jury was instructed not to consider any evidence related to the defendant's character or record. The language suggested by the defendant is

in the pattern jury instruction but was inadvertently omitted by the trial court. See T.P.I.—CRIM. 7.04(c) (4th ed. 1995); see also *id.* (7th ed. 2002).

A jury instruction on mitigating circumstances may be found “prejudicially erroneous” only if “it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law.” State v. Reid, 91 S.W.3d 247 app. at 308 (Tenn. 2002) (quoting State v. Hodges, 944 S.W.2d 346, 352 (Tenn.), *cert. denied*, 522 U.S. 999 (1997)). In the instant case, we conclude that the instructions provided by the trial court when viewed in their entirety fairly submitted to the jury the legal issues. Accordingly, the omission in the trial court’s instruction did not prejudice the defendant.

B. Burden of Proving Mitigators

The defendant asserts the failure to instruct the jury that he did not have the burden of proof as to any mitigating factors was prejudicial. The jurors were instructed that the state had the burden of proving beyond a reasonable doubt any aggravating factor. They were further instructed there was no requirement for unanimity with respect to any particular mitigating factor. Upon reading the instructions as a whole, we fail to conclude the alleged omission misled the jury.

C. Closing Argument by the State

The defendant next objects to a portion of the state’s closing argument during which the prosecutor asserted it was “patently offensive” to argue that the defendant’s life should be spared because of his children and that such a plea was equally offensive in view of the defendant’s lack of remorse. These statements were made during the state’s rebuttal closing following the defendant’s plea for mercy based upon his family support and potential for rehabilitation. The trial court cautioned the prosecutor after the defense objected to these statements. The trial court further instructed the jury:

Ladies and Gentlemen, let me say to you that the appearance, or lack of appearance, on behalf of Mr. Robinson of any remorse is not a factor for you to consider in determining what the punishment in the case should be. . . .

Lack of remorse is not a statutory aggravating circumstance, and it is not proper rebuttal because the defendant did not argue his remorse as a mitigating factor. However, the jury is presumed to follow the curative instruction of the trial court. State v. Butler, 880 S.W.2d 395, 399 (Tenn. Crim. App. 1994). Accordingly, although the prosecutor erred, such error is harmless in light of the curative instruction.

D. Trial Court’s Limitation on the Defendant’s Testimony

The defendant complains he was prevented from presenting evidence of his innocence at the penalty phase by virtue of an *in limine* order. Specifically, the defendant refers to the trial court’s ruling regarding his statement given outside the presence of the jury at the beginning of the sentencing phase. During this jury-out hearing, the defendant asserted he was wrongfully convicted. He also stated he did not receive a fair trial due to the admission of improper testimony, which the

jury did not disregard. He further alluded to various instances of misconduct by a particular juror and improper removal of evidence from the courtroom by the prosecutor. In response to these statements, the trial court made the following ruling:

I'm not going to allow him to testify about the entire case in front of the jury, whether he, if he wants to testify he got a fair trial, or didn't get a fair trial and on all these other statements he wants to make. That may be proper, but I'm not going to allow him to get up there to attack a particular juror, so that's the basis for my decision.

The defendant subsequently testified but made no reference to the alleged unfairness of his trial. The defendant has cited no authority indicating a defendant has the right to testify that he did not receive a fair trial and verbally attack jurors. Nor do we find such attacks to be proper residual doubt testimony. "Residual doubt evidence" generally consists of proof at the sentencing phase indicating the defendant did not commit the offense, notwithstanding the guilty verdict. State v. McKinney, 74 S.W.3d 291, 307 (Tenn.), *cert. denied*, ___ U.S. ___ (2002); State v. Hartman, 42 S.W.3d 44, 55-56 (Tenn. 2001). Although the defendant had the right to proclaim his innocence, we are unable to conclude that he was prevented from doing so by virtue of the trial court's ruling.

E. Other Errors

The defendant asserts numerous errors during the penalty phase regarding closing arguments and the jury instructions which related to mitigating circumstances. We have reviewed the defendant's assertions and find the defendant is not entitled to relief on any of these issues.

XIX. ADMISSION OF PHOTOGRAPH DURING PENALTY PHASE

The defendant contends that the trial court erred in admitting a photograph depicting a detailed and close-up view of the gruesome wounds to the victim's face during the penalty phase. Although the trial court refused to admit the photograph at the guilt phase, the court permitted its introduction at the penalty phase, advising the jury to consider it only for the purpose of determining whether the crime was heinous, atrocious, cruel, or constituted torture.

Photographs depicting a victim's injuries have been held admissible to establish torture or serious physical abuse under aggravating circumstance (i)(5). *See, e.g., State v. Smith*, 893 S.W.2d 908, 924 (Tenn.1994) (photographs depicting the victim's body, including one of the slash wounds to the neck, which was "undeniably gruesome," were relevant to prove that the killing was "especially heinous, atrocious, or cruel" and were admissible for that purpose), *cert. denied*, 516 U.S. 829 (1995). The photograph in question accurately depicts the nature and severity of the injuries inflicted upon the victim. This evidence was relevant to the state's proof of the "heinous, atrocious, or cruel" aggravating circumstance. The decision to admit this photograph was not an abuse of discretion.

XX. PROSECUTOR'S ARGUMENTS

The defendant complains the state attempted to suggest the defendant intended to obliterate the victim's identity despite the fact there was no evidence to that effect, and the trial court repeatedly instructed the state not to do so. The defendant references the following argument of the state: "This was an extortion of his whole identity. His whole face, his identity. The aggravator we've proven is that there was a felony involved and that this was heinous, atrocious, and cruel." We discern no error regarding this statement.

XXI. JURY INSTRUCTIONS DURING SENTENCING

The defendant asserts the written verdict form misstated the law and allowed the jury to impose the death penalty without requiring the state to prove the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. At issue is that portion of the charge setting forth the requirements authorizing a sentence of death. The trial court quoted the pattern jury charge verbatim. *See* T.P.I.—CRIM. 7.04(c) (4th ed. 1995); *see also id.* (7th ed. 2002) (containing identical language). We are unable to conclude this charge misled the jury.

The defendant further contends the trial court erred by failing to define the "knowing" *mens rea* required for the felony murder aggravator. *See* Tenn. Code Ann. § 39-13-204(i)(7). If the court erred, the error was harmless.

XXII. EXISTENCE OF AGGRAVATING FACTORS

The jury found two aggravating circumstances supported the imposition of the death penalty: (i)(5), "the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death"; and (i)(7), "the murder was knowingly committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit . . . kidnapping." *See* Tenn. Code Ann. § 39-13-204(i)(5), (7). The defendant contends there was insufficient evidence to support the application of either factor, and, even if applicable, they did not outweigh the mitigating factors.

In determining whether the evidence supports a jury's finding of a statutory aggravating circumstance, the proper inquiry for an appellate court is whether, after reviewing the evidence in the light most favorable to the state, a rational trier of fact could have found the existence of the aggravating circumstance beyond a reasonable doubt. *State v. Suttles*, 30 S.W.3d 252, 262 (Tenn.), *cert. denied*, 531 U.S. 967 (2000).

We conclude the evidence sufficiently supports the jury's application of both aggravating factors and the jury's determination that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt.

XXIII. PROSECUTORIAL INCONSISTENCIES AND THE DEATH PENALTY

The defendant contends the state's use of inconsistent theories regarding his relative rank as a Gangster Disciple during his trial and that of co-defendant Prentiss Phillips during Phillips' trial violated due process, thus, requiring that the sentence of death imposed against him be vacated. We conclude there was a due process violation relating to the death penalty.

As previously discussed in this opinion, the state's proof and arguments in the defendant's trial portrayed the defendant to be the highest ranking member of the Gangster Disciples present at the "aid and assist" meeting after the exit of Kaos. At the trial of Prentiss Phillips, the state presented contradictory proof and argument that Phillips, as the coordinator of the Hurt Village Gangster Disciples, was the highest ranking member. We have found the state's proof and theories on this point to be inconsistent, contradictory, and factually irreconcilable, although not meriting relief on the issue of guilt. Therefore, we must next determine whether the state's inconsistent proof and arguments merit relief as to the sentence of death.

Capital cases demand heightened due process requirements. Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976). We must scrutinize the effect of the state's inconsistent positions upon the imposition of the death penalty in the instant case under this heightened standard. See Caldwell v. Mississippi, 472 U.S. 320, 323, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985).

Under the circumstances of this case and the heightened standard of review, we conclude the state's proof and argument that the defendant was the highest ranking member of the Gangster Disciples who participated in the offenses may well have impacted the jury's decision to impose the ultimate penalty of death. We cannot conscientiously conclude the jury would have necessarily imposed a sentence of death had it known of the state's inconsistent evidence. Since the state presented contradictory proof and argument to a separate jury during the trial of Prentiss Phillips, we hold that the state's inconsistent theories regarding the relative rank of the defendant and co-defendant Phillips violated the defendant's due process rights regarding the imposition of the death penalty. Accordingly, had we not reversed the murder conviction, we would have granted relief as to the sentence of death.

XXIV. APPENDI V. NEW JERSEY

The defendant asserts that his sentence of death should be vacated as unconstitutional because the prosecutor, and not a grand jury, made the decision to seek the death penalty. He relies upon Appendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The defendant concedes that our supreme court has rejected this argument in State v. Dellinger, 79 S.W.3d 458, 467 (Tenn.), *cert. denied*, ___ U.S. ___, (2002), but seeks to preserve the issue for future appellate review. We are not at liberty to overrule our state supreme court. State v. Middlebrooks, 995 S.W.2d 550 app. at 569 (Tenn. 1999).

XXV. THIRTEENTH JUROR - PENALTY PHASE

The defendant argues that the trial court, acting in its capacity as “thirteenth juror” pursuant to Tennessee Rule of Criminal Procedure 33(f), should have granted a new sentencing hearing since the jury’s death verdict was contrary to the weight of the evidence. As previously indicated in this opinion, the trial court expressly approved the verdict as thirteenth juror in its order overruling the motion for new trial. The order specifically referred to the convictions as well as the penalty of death. This issue lacks merit.

XXVI. CONSTITUTIONALITY OF THE TENNESSEE DEATH PENALTY STATUTE

The defendant contends our death penalty statute is unconstitutional. The Tennessee death penalty statute has been upheld repeatedly. *See, e.g., State v. Reid*, 91 S.W.3d 247 app. at 312-14 (Tenn. 2002); *State v. Hines*, 919 S.W.2d 573, 582 (Tenn. 1995), *cert. denied*, 519 U.S. 847 (1996).

The defendant also argues death by lethal injection is unconstitutional. While the Tennessee Supreme Court has not expressly addressed this issue, *see State v. Suttles*, 30 S.W.3d 252, 264 (Tenn.), *cert. denied*, 531 U.S. 967 (2000), such challenges have been rejected by other courts. *See Poland v. Stewart*, 117 F.3d 1094, 1104-05 (9th Cir. 1997), *cert. denied*, 523 U.S. 1082 (1998); *State v. Webb*, 750 A.2d 448, 458 (Conn.), *cert. denied*, 531 U.S. 835 (2000); and *State v. Hinchey*, 890 P.2d 602, 610 (Ariz.), *cert. denied*, 516 U.S. 993 (1995). We likewise conclude that lethal injection is not constitutionally prohibited.

XXVII. COMPARATIVE PROPORTIONALITY REVIEW

A. Rule 12 Database and Rule 12 Report

The defendant asserts the Rule 12 database is not a satisfactory research tool. As our supreme court has noted, the Rule 12 database is only one research tool available in locating similar cases. *State v. Godsey*, 60 S.W.3d 759, 785 (Tenn. 2001). Accordingly, any alleged flaws in the Rule 12 database do not preclude meaningful proportionality review by the appellate courts of this state. Further, the defendant contends the Rule 12 report in this case is defective because the trial court did not follow the proper procedure. We have reviewed the Rule 12 report and find no material deficiency.

B. Proportionality

The defendant attacks the proportionality of his death sentence, alleging it is disproportionate to the imposition of the death penalty in other capital cases. While no two capital cases and no two capital defendants are alike, we have reviewed the circumstances of the present case and those first degree murder cases with apparent similarities in which the death penalty has been imposed. The sentence of death has been upheld in cases where the victim was murdered execution-style. *See, e.g., State v. Reid*, 91 S.W.3d 247, 287-88 (Tenn. 2002). The death penalty has also been imposed based upon the application of both the (i)(5) and (i)(7) aggravating circumstances. *See, e.g., State v. Teel*, 793 S.W.2d 236, 250-52 (Tenn.), *cert. denied*, 498 U.S. 1007 (1990).

In reviewing the proportionality of the defendant's sentence, however, we have primarily examined those cases in which Tennessee courts have upheld the imposition of the death penalty upon "non-triggermen" who were not present at the scene of the murder. By and large, these cases involved defendants who hired "hitmen" to commit the murders.

In State v. Austin, the defendant hired Blankenship to kill the victim, an undercover agent who was to be the principal witness against the defendant on illegal gambling charges. 87 S.W.3d 447, 456-57 (Tenn. 2002), *cert. denied*, ___ U.S. ___ (2003). The defendant's employee drove Blankenship to the crime scene where Blankenship shot the victim numerous times. The defendant paid Blankenship \$980 after the murder was accomplished. *Id.* at 457. The jury relied upon the "murder for hire" aggravating circumstance, *see* Tenn. Code Ann. § 39-13-204(i)(4), in imposing the death penalty. *Id.* at 464. In upholding the jury's finding and the imposition of the death penalty, our state supreme court noted the defendant instigated the plan to murder the victim and hired the actual killer. *Id.* at 465.

Likewise, in State v. Stevens, the defendant hired Milliken to murder the defendant's wife and mother-in-law. 78 S.W.3d 817, 823 (Tenn. 2002), *cert. denied*, ___ U.S. ___ (2003). He instructed Milliken to make the murders appear as if they were committed during a burglary; told Milliken to use a knife if he could not locate a gun; directed Milliken as to which victim should be killed first; and advised Milliken on how to dispose of the murder weapon. *Id.* at 823-24. The defendant went to a job site while Milliken committed the murders. *Id.* at 825. In imposing the death penalty, the jury relied upon the "prior violent felony" and "murder for hire" aggravating circumstances. *Id.* at 822; *see* Tenn. Code Ann. § 39-13-204(i)(2), (4). In conducting its comparative proportionality review, the supreme court noted the great care the defendant took in planning the murders, recognizing that it had upheld the death penalty in several cases involving "murder for hire." *Id.* at 842-43.

The defendant in State v. Hutchison purchased a large life insurance policy on the victim's life and hired an acquaintance to arrange for the victim to be murdered while the victim and a co-conspirator were on a fishing trip. 898 S.W.2d 161, 164-65 (Tenn. 1994), *cert. denied*, 516 U.S. 846 (1995). The victim was drowned after the co-conspirator left the victim in a boat with two hired killers. *Id.* The jury found the existence of the "murder for hire" aggravating circumstance, *see* Tenn. Code Ann. § 39-13-204(i)(4), and imposed the death penalty. The Tennessee Supreme Court concluded the circumstances of the offense supported the jury's verdict. *Id.* at 175.

Defendant Gaile Owens solicited her co-defendant, Sidney Porterfield, to kill her husband. State v. Porterfield, 746 S.W.2d 441, 444 (Tenn.), *cert. denied*, 486 U.S. 1017 (1988). She instructed Porterfield where the victim would be, took her children to a restaurant, and visited her sister before returning home at approximately 11:00 p.m. to find her husband unconscious in the den. *Id.* The victim died six hours later from multiple blows to the head. *Id.* The jury imposed the death penalty upon defendant Owens after finding the "murder for hire" and the "especially heinous, atrocious, or cruel" aggravating circumstances. *Id.* at 448; *see* Tenn. Code Ann. § 39-13-204(i)(4), (5). The Tennessee Supreme Court found the evidence was sufficient to support the aggravating factors. *Id.* at 449. In the post-conviction proceeding of defendant Owens, our court rejected her argument that

vicarious application of the “especially heinous, atrocious, or cruel” aggravating circumstance was unconstitutional. Owens, 13 S.W.3d at 764.¹⁰

In State v. Groseclose, defendants Groseclose, Rickman, and Britt were convicted of first degree murder for killing Groseclose’s wife. 615 S.W.2d 142, 144 (Tenn.), *cert. denied*, 454 U.S. 882 (1981). Groseclose planned the victim’s death several weeks prior to the murder. *Id.* Groseclose contacted Rickman through various individuals, and Rickman agreed to commit the murder. *Id.* at 144-45. When Groseclose left the residence, he left the door unlocked, and Rickman and Britt entered the residence. *Id.* at 145. Rickman strangled the victim until she lost consciousness and then stabbed her repeatedly in the back. *Id.* Groseclose and Rickman received the death penalty, while Britt received life imprisonment. *Id.* at 144. Our supreme court found the jury did not act arbitrarily or capriciously in imposing the death penalty on Groseclose and Rickman, but not on Britt, who, unlike his co-defendants, expressed remorse. *Id.* at 148-49. The court further concluded the evidence was sufficient to support the aggravating circumstances, which the jury found applied to both Groseclose and Rickman, “including the fact that this was a murder for hire and that it was particularly brutal and atrocious.” *Id.* at 148.¹¹

In comparing the instant case to these cases, we first note that the murder of Vernon Green did not involve a “murder for hire,” nor was it carefully planned by the defendant. Further, there is no proof the defendant instructed his co-defendants as to the method of killing Green.

We further examine the defendant’s contention that his sentence is disproportionate to that of his co-defendants, Antonio Jackson, Jarvis Shipp, and Kevin Wilkins, all of whom received penitentiary sentences. In addition, the defendant emphasizes that Prentiss Phillips was convicted of premeditated first degree murder and especially aggravated kidnapping as was the defendant; however, a jury sentenced Phillips to life without the possibility of parole for the murder. State v. Phillips, 76 S.W.3d at 3.

Our statutory proportionality review made pursuant to Tennessee Code Annotation section 39-13-206(c)(1)(D) involves the comparison of only those cases in which a capital sentencing hearing was conducted. State v. Bland, 958 S.W.2d 651, 666 (Tenn. 1997), *cert. denied*, 523 U.S. 1083 (1998). Our state supreme court recently declared it would not consider the lesser sentences imposed upon co-defendants in making its proportionality review where co-defendants were not subjected to capital proceedings. Austin, 87 S.W.3d at 465-66. Consequently, this court will not consider the sentences imposed upon Antonio Jackson, Jarvis Shipp, or Kevin Wilkins. However, because Prentiss Phillips’

¹⁰As previously noted, our state supreme court subsequently indicated it did “not necessarily adopt” our court’s vicarious application of the “heinous, atrocious, or cruel” aggravator. Johnson, 38 S.W.3d at 67 n.17.

¹¹The convictions and sentences were later reversed in federal habeas corpus proceedings based upon ineffective assistance of counsel. See Groseclose v. Bell, 130 F.3d 1161, 1171 (6th Cir. 1997), *cert. denied*, 523 U.S. 1132 (1998); Rickman v. Bell, 131 F.3d 1150, 1160 (6th Cir. 1997), *cert. denied*, 523 U.S. 1133 (1998). On retrial, Groseclose was convicted of accessory to murder and Rickman was again convicted of first degree murder. Both were sentenced to life imprisonment. See State v. Ronald Eugene Rickman and William Edward Groseclose, No. W 1999-01744-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 449, at *5 (Tenn. Crim. App. May 17, 2002, at Jackson).

sentence was likewise imposed by a jury during a capital sentencing hearing, we must consider it as part of our proportionality review.

If there is a rational basis for the jury's decision to impose the death penalty upon one perpetrator but not a co-perpetrator, the sentences are not disproportionate. State v. Cauthern, 967 S.W.2d 726, 741 (Tenn.), *cert. denied*, 526 U.S. 967 (1998). In Cauthern, our state supreme court found Cauthern, who received the death penalty, was the more culpable offender, while his co-defendant Patterson, who received a life sentence, had expressed remorse, gave consistent statements to law enforcement, and presented mitigating proof to the jury concerning his military service and life history. Therefore, there was a rational basis for different sentences. *Id.*

In the instant case, we are unable to find a rational basis to justify the imposition of the death penalty upon the defendant, but not upon Phillips, for the same murder. In this trial, the defendant was portrayed by the state as the ranking Gangster Disciple who ordered the murder. In co-defendant Phillips' trial, Phillips was portrayed by the state as the ranking Gangster Disciple who ordered the murder. Both the defendant and co-defendant Phillips were convicted of the same murder upon the same theory of criminal responsibility based upon giving orders for the murder; neither was present at the scene of the murder. The state relied upon the identical two aggravators in both cases. The jury found both aggravators applicable to the defendant; yet, even though the underlying facts supporting the "heinous, atrocious, or cruel" aggravator were exactly the same in both cases, the jury, as was clearly its prerogative, declined to apply this aggravating factor in co-defendant Phillips' case. Thus, because the underlying facts supporting this aggravator were identical in both cases and neither defendant was present at the scene of the murder, we are unable to give any significant weight to the fact that the defendant had two aggravators and co-defendant Phillips had one aggravator. Moreover, after reviewing the evidence presented at both capital sentencing hearings, we cannot say that Phillips presented more compelling mitigating evidence than the defendant. In fact, the opposite is true because the only mitigating testimony presented by Phillips was that of his mother, who testified very briefly about his childhood and family. The Rule 12 report indicates Phillips had a prior rape conviction, whereas the defendant's Rule 12 report indicates the defendant had a prior record but does not identify the offense or offenses. Statements during the trial indicate the defendant had a recent conviction for simple possession of a controlled substance and a prior "dope charge . . . back in the nineties."

We are forced to conclude that these two cases are extremely similar, and the imposition of the death penalty upon the defendant, and not upon co-defendant Phillips for the same murder, would be comparatively disproportionate. We have also noted the differences in this case as compared to other cases where the non-triggerman defendant was not present at the scene of the homicide.

In so finding, this court is in no way implying that the Phillips' jury reached an improper verdict of life without parole; this was clearly within the jury's prerogative. Furthermore, the defendant's jury did not erroneously sentence the defendant to death based upon the evidence before it. In fact, the defendant was tried before Phillips; thus, the defendant's jury could not know what the Phillips' jury would do.

A proportionality review is not constitutionally required. Bland, 958 S.W.2d at 663. Instead, our proportionality review is required by statute and is based upon information unavailable to the jury, namely, a comparison with other cases. *See* Tenn. Code Ann. § 39-13-206(c)(1)(D). It is strictly a resource that is to be applied by appellate courts to prevent a disproportionate death sentence. *Id.* However, if our statutory review reflects that a defendant's sentence of death is disproportionate to similar cases, it may not stand. *See Godsey*, 60 S.W.3d at 793. We conclude in this case the defendant's sentence is disproportionate to the penalty imposed in similar cases, especially that of co-defendant Phillips, and cannot withstand statutory scrutiny.

REMAND

This case will occupy a unique status upon remand because we have concluded (1) the state's evidence and arguments in the defendant's trial and co-defendant Phillips' trial were inconsistent, contradictory, and irreconcilable, thereby depriving the defendant of due process as it relates to the sentence of death; and (2) the defendant's sentence of death is comparatively disproportionate to similar cases, especially co-defendant Phillips' case.

Because the state presented inconsistent evidence at co-defendant Phillips' trial relating to rank, the state upon retrial is barred from presenting evidence or arguing during any of the proceedings that the defendant was the highest ranking Gangster Disciple at the apartment or held a higher rank than Phillips.¹² However, the state is not precluded from presenting evidence that the defendant was a high ranking Gangster Disciple nor is it precluded from presenting evidence that the defendant outranked those other than Phillips. *See Smith*, 205 F.3d at 1054 (holding prosecutor is barred from using evidence upon remand that is inconsistent with that used in trial of co-defendant); *see also* Poulin, *Prosecutorial Inconsistency*, 89 Calif. L. Rev. at 1478 ("If new evidence favorable to the first-tried defendant prompted the prosecution's change in position, that defendant should be given the benefit of the new evidence.").

We have further found the sentence of death is disproportionate. We must now determine whether the defendant is eligible for the death penalty upon remand. The "clean slate" rationale of allowing the state to seek the death penalty upon retrial of a capital case does not apply "whenever a jury agrees or an appellate court decides that the prosecution has not proved its case." Bullington v. Missouri, 451 U.S. 430, 443, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981). However, the defendant was "initially sentenced to death and [has] not been acquitted of the death penalty" by the jury. State v. Harris, 919 S.W.2d 323, 330 (Tenn. 1996). Our conclusion that the defendant's due process rights relating to the death penalty were violated by the prosecution's use of inconsistent evidence is a legal error, not a matter of insufficient evidence. *See id.* However, we reach a different conclusion with regard to disproportionality. Although this is a matter of first impression, we conclude that a finding of disproportionality is a determination by "an appellate court . . . that the prosecution has not proved its case" within the meaning of Bullington. 451 U.S. at 443. We also note that had the defendant

¹²This includes the guilt phase of a retrial. We did not find an actual due process violation relating to the guilt phase; however, we did find that inconsistent evidence and prosecutorial arguments existed. Thus, it would not be proper to allow the state to knowingly use evidence or arguments inconsistent with that presented in Phillips relating to the relative rank of the defendant and Phillips.

been unsuccessful on all issues except disproportionality, this court would have affirmed the murder conviction and reduced the sentence to life without parole, thus, making him ineligible for the death penalty. *See Godsey*, 60 S.W.3d at 793. Because the defendant has also been successful in securing a new trial as to guilt or innocence, it would be improper and punitive for the defendant to face the possibility of the death penalty simply because he was also successful in securing a new trial. Thus, the state may not seek the death penalty on remand.

CONCLUSION

We echo the sentiments of another panel of this court in co-defendant Prentiss Phillips' appeal: "We acknowledge the challenges faced by the jury in cases such as this one where the truth is clouded by secret and elaborate gang rituals; the use of two and three code names for gang members; and the commission of crimes by groups." *Phillips*, 76 S.W.3d at 10. Nevertheless, our review of the record indicates a new trial is mandated because of the failure to charge proper lesser-included offenses. Pursuant to our conclusions in the preceding section of this opinion, upon remand: (1) the state will be precluded from introducing evidence and making arguments pertaining to the relative rank of the defendant and Phillips that are inconsistent with and contrary to the evidence and arguments in co-defendant Phillips' trial; and (2) the defendant shall be ineligible for the death penalty.

Accordingly, we reverse and remand for a new trial.

JOE G. RILEY, JUDGE